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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 142

STATE OF LOUISIANA, EX REL. WILLIE FRANCIS, PETITIONER,

vs.

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED JUNE 4, 1946.

CERTIORARI GRANTED JUNE 10, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

STATE OF LOUISIANA, PARISH OF ST. MARTIN, FIRST JUSTICE COURT, FIRST WARD

AFFIDAVIT OF E. L. RESWEBER—Filed August 8, 1945

Before me, the undersigned Justice of the Peace in and for the Parish and Ward aforesaid, personally came and appeared E. L. Resweber, Sheriff, who being duly sworn, deposes and says that on or about the 8th day of November, 1944 in the Parish of St. Martin, one Willie Francis, late of the Parish of St. Martin, did then and there feloniously, wilfully, and of his malice aforethought, kill and murder one Andrew Thomas contrary to the form of the statutes of the State of Louisiana, in such case made and provided and against the peace and dignity of the same.

Wherefore deponent prays that the said Willie Francis may be arrested and further dealt with according to law.

(S.) E. L. Resweber.

Sworn to and subscribed before me this 8th day of Aug., 1945. (S.) D. E. DuChamp, Justice of the Peace.

[File endorsement omitted.]

[fol. 2] IN SIXTEENTH JUDICIAL DISTRICT COURT, PARISH OF ST. MARTIN

INDICTMENT—Filed September 5, 1945

In the name and by the authority of the State of Louisiana, the Grand Jurors of the State of Louisiana, impanelled and sworn to inquire in and for the body of the Parish of St. Martin, in the Sixteenth Judicial District of the said State, upon their oath, present that one Willie Francis late of the Parish of St. Martin, in the Parish of St. Martin, State of Louisiana, and within the jurisdiction of the Sixteenth Judicial District of the said State, with force and arms, on or about the 8th day of November in the year of our Lord, One Thousand Nine Hundred and Forty-four Murdered Andrew Thomas.

Contrary to the form of the Statutes of the State of Louisiana, in such case made and provided and against the peace and dignity of the same.

(S.) L. O. Pecot, District Attorney 16th. Judicial District of the State of Louisiana.

[File endorsement omitted.]

[fol. 3] [Endorsed:] No. 2161. State of Louisiana versus Willie Francis. Indictment. Murder. State Witnesses: Dr. S. D. Yongue, Dr. A. R. Gorne, R. L. Thomas, Van Brocklin, E. L. Resweber, Clemire Norris, Captain K. H. Wright, Dr. Earl Eastin, Albert Judice, Claude Thomas, Pete Dauphine, Detective Edmund Oster, Port Arthur, Texas; Auguste Fuselier, E. L. Canada, Port Arthur, Texas; Claude W. Goldsmith, Port Arthur, Texas; Joseph Trahan, Ovey Meynard, W. D. Atkins. A true Bill: (S.) Max A. Pardee, Foreman. Guilty as charged. (S.) Edwin Rees, Foreman. Rec'd & filed September 13th, 1945. (S.) Mina G. Willis, Dy. Clerk of Court.

[fols. 4-5] In District Court, Parish of St. Martin

#2161

State of Louisiana

vs.

Willie Francis

Murder

Minute Entry—September 6, 1945

The Court after interrogating the accused as to whether or not he had employed counsel and on receiving a negative reply, and upon further interrogation as to his financial ability to employ counsel, the Court, in view of the impecunious condition of the accused, thereupon appointed and assigned the Honorable James R. Parkerson of the Franklin Bar and the Honorable Otto J. Mestayer, of the New Iberia Bar to serve as associate Counsel for the accused in the trial of the case. The accused was thereupon called for arraignment and after a reading of the indictment in full

to the accused, in the presence of his counsel, James R. Parkerson, and upon being asked his plea, entered a plea of "Not Guilty", and asking for a trial by a jury. Counsel for the accused thereupon requested the Court the right to withdraw its plea of Not Guilty and to thereafter, if thought advisable file any pleas or demurrers to the indictment, which reservation was granted by the Court effective to the date of trial. The Court thereupon assigned this case for trial for Wednesday September 12, 1945, at 10:00 o'clock, A. M. Counsel for the State thereupon moved for service of a copy of indictment and copy of the venire on the accused which was ordered by the Court. All of the above in the presence of the accused and of his assigned counsel.

The Sheriff was ordered to adjourn Court until Friday, September 7, 1945, at 10:00 o'clock, A. M.

(S.) Mina G. Willis, Deputy Clerk of Court.

Approved: (S.) James D. Simon, Judge.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 6] In District Court, Parish of St. Martin

Minute Entry—September 12, 1945

This case having been previously assigned for trial this day was called. The State through the District Attorney and James R. Parkerson and Otto J. Mestayer, as counsel for the accused being present in court together with the accused announced their readiness for trial.

Counsel for the Defense asserting the futility of obtaining a full jury from the regular panel suggested to the Court that they would waive the opening of the Tales Jury Box and suggested to the Court that the Sheriff be ordered to notify Forty (40) Special Talesmen qualified to serve as Jurors in this Parish and ordered to report into open Court at Two o'clock P. M., thereby avoiding any unreasonable delay in the trial. Whereupon the Court ordered the Sheriff to summon instanter Forty (40) Special Talesmen for Jury Service and that they be ordered to report into court at Two (2:00) o'clock, P. M. It was further ordered that the list of persons so summoned be furnished counsel for the

State, and the Defense, and that the individual names be written on separate slips of paper, placed in an envelope, sealed and delivered to the Clerk of Court.

The Court ordered the Sheriff to read the names of the witnesses summoned by the State and by the Defense, and on motion of Counsel for the Defense, the witnesses were placed under Rule. All witnesses having answered to their names, the Court ordered the trial of the case to proceed. Accordingly, the empanelling of the Jury was proceeded with, and after all challenges for cause and peremptory challenges had been exercised by the State and the Defense, Eight Jurors had been selected and administered their oath out of the regular panel: Michel Simon, Moise Ambroise Theriot, Anasta Patin, Remi Meche, Patrick H. Maraist, Moise LeBlanc, L. C. Domengues, and J. H. Naquin. Counsel for the Defense having waived the opening of the Tales Jury Box and the Sheriff having summoned into Court Forty Citizens possessing the qualifications of Jurors and the list of said names having been furnished both the State and the Defense, the Court then ordered the continuation of the empanelling of the Jury from said special Talesmen.

After all challenges for cause and peremptory challenges had been exercised by the State and the Defense, the following four named Jurors; namely: Edwin Webre, Edwin Rees, Jerry Guidry, and Lloyd Guidry were administered their oath.

[fol. 7] In view of the possibility of a protracted trial, the Court ordered the selection of an alternate Juror. After examination and challenges, Felix Pellerin was selected by the State and the Defense as the alternate Juror and administered his oath. After the polling of the Jury, the Court ordered the Sheriff to finally discharge the remainder of the Petit Jury panel and the special Talesmen summoned into Court and whose names had not been drawn.

The District Attorney proceeded to read the indictment returned by the Grand Jury, the law applicable thereto and his opening statement. Counsel for the accused waived the right of their opening statement but reserved the privilege of making such statement at the conclusion of the State's case. The Court thereupon ordered that the trial proceed by the State offering its proof. After hearing witnesses offered by the State and it being 10:15 P. M. the Court, after instructing the Jury and remanding them into

the custody of the Sheriff adjourned Court until Thursday, September 13, 1945, at 10:00 o'clock A. M.

(S.) Mina G. Willis, Deputy Clerk of Court.

Approved: (S.) James D. Simon, Judge.

[1]Clerk's Certificate to foregoing paper omitted in printing.

[fol. 8] In District Court, Parish of St. Martin

Minute Entry—September 13, 1945

This case having been ordered to be resumed for trial this day was called. The State through the District Attorney and James R. Parkerson and Otto J. Mestayer, as counsel for the accused, being present in court together with the accused, the court ordered the Sheriff to escort the Jury into the Courtroom. The polling of the Jury being waived, the Court ordered the trial of the case to proceed. After hearing the remaining evidence submitted by the District Attorney on behalf of the State, the State announced that it rested its case subject to rebuttal. Counsel for the Defense announced to the Court that it had no evidence to offer on behalf of the accused and rested its case. After the arguments of counsel for the State and for the Defense the Court thereupon proceeded to duly instruct the Jury on their duties and the law, following which the Jury retired to their room for deliberation.

The Sheriff in charge of the Petit Jury having thereafter informed the Court that the Jury had announced its readiness to report its verdict into Court, the Court thereupon ordered the Sheriff to escort in the Jury.

Counsel for the State and for the Accused having waived the polling of the Jury, the Court thereupon inquired from the Jury whether they had arrived at a verdict. Upon receiving an affirmative answer, the Court ordered the Foreman of the Jury to hand the Indictment and Verdict to the Sheriff. Whereupon the Clerk of Court, under the orders of the Court announced the Verdict of the Jury reading as follows: "Guilty as Charged, Edwin Rees, Foreman."

Counsel for the Defense then moved that the Jury be polled individually to determine whether the Verdict so announced was their respective Verdict. Upon a polling of the Jury by the Clerk upon the orders of the Court, each

Juror announced the Verdict as shown on the back of the Indictment to be his respective verdict. All of the above being done in the presence of the accused and his counsel. Whereupon, the Court ordered the Clerk of Court to record the Verdict and that the Accused be remanded to the Parish Jail to await the Sentence of the Court.

[fol. 9] The Sheriff was ordered to adjourn Court until Friday, September 14, 1945, at 10:00 o'clock A. M.

(S.) Mina G. Willis, Deputy Clerk of Court.

Approved: (S.) James D. Simon, Judge.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 10] In District Court, Parish of St. Martin

* * * * * * * *

Minute Entry—Filed September 14, 1945

The accused having been called up for sentence, the following sentence was imposed: Under Article 30 of the Criminal Code of Louisiana, I now sentence you Willie Francis to suffer death in the manner provided by law.

The Sheriff was ordered to adjourn Court without date.

(S.) Mina G. Willis, Deputy Clerk of Court.

Approved: (S.) James D. Simon, Judge.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 11] Death Warrant

Executive Department

Baton Rouge, La., March 29th, 1946.

To the Sheriff of the Parish of St. Martin:

Whereas, it appears from the annexed daly certified copy of the Court proceedings that, at a session of the Honorable the Sixteenth Judicial District Court, Parish of St. Martin, State of Louisiana, and held on the 13th day of September, 1945, Willie Francis was tried and convicted of the crime of Murder and for said offense was by judgment of said Court rendered on the 14th day of September, 1945, sentenced by His Honor, the Judge of said Court, to die in the manner and form prescribed by law.

Now, Therefore, I, J. H. Davis, Governor of the State of Louisiana, do hereby direct and require you, the Sheriff of the Parish of St. Martin to cause the execution to be done on the body of said Willie Francis so convicted and condemned, in all things according to the judgment and sentence of said Court and the law in all such cases made and provided, by electrocution; that is, causing to pass through the body of the said Willie Francis a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the said Willie Francis until said Willie Francis is dead. Said execution to take place in the Parish of St. Martin, State of Louisiana, on the 3rd day of May, 1946, between the hours of 12:00 o'clock Noon and 3:00 o'clock P. M., within the walls of the Parish Jail in a room entirely cut off from view of all, except those permitted by law to be in said room. Such execution shall take place in the presence of the Sheriff of said Parish or one of his duly designated deputies, the Coroner of said Parish, a physician summoned by the Sheriff to be present, the operator of the electric chair, a Priest or Minister of the Gospel, if requested by the condemned person, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under twenty-one years of age to be allowed in said execution room. Said persons shall duly attest the Proces Verbal of the execution under oath, which Proces Verbal shall be filed with the Clerk of the Court of the Parish of St. Martin together with the annexed duly certified copy of the proceedings had in said case in said Court, and for all of which this shall be your warrant and authority.

Given under my signature and the Great Seal of the State of Louisiana, at the State Capitol, in the City of Baton Rouge, on this the 29th day of March, A. D. 1946.

(Signed) J. H. Davis, Governor of the State of Louisiana. (Seal.)

By the Governor: (Signed) Wade O. Martin, Jr., Secretary of State.

Received & filed April 4th, 1946.

(Signed) M. A. Barras, Deputy Clerk of Court.

A true copy of the original.

Attest:

(S.) E. L. Resweber, Sheriff of St. Martin Parish, La.

[fol. 12] REPRIEVE

State of Louisiana

Executive Department

Baton Rouge

To: The Honorable E. L. Resweber, Sheriff, Parish of St. Martin, St. Martinville, Louisiana.

Whereas, Willie Francis was convicted of the crime of murder in the Sixteenth Judicial District Court in and for the Parish of St. Martin, and

Whereas, sentence of death was imposed; and

Whereas, I have heretofore issued my warrant ordering his execution on the 3rd day of May, 1946, and

Whereas, it appears that the ends of justice will be served if the execution of said warrant is stayed and a reprieve until May 9, 1946, is granted to said Willie Francis.

Now, Therefore, I, James H. Davis, Governor of the State of Louisiana, hereby stay compliance with said warrant ordering the execution of said sentence, and do issue a reprieve to the said Willie Francis, and direct you as Sheriff of the Parish of St. Martin to stay the execution of said sentence until Thursday, May 9, 1946, at which time you are commanded to cause the execution to be done on the person so condemned in all things according to the judgment against him, and my said warrant, and otherwise to perform all duties imposed upon you by said warrant in due form of law.

In Testimony whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Louisiana, at the Capitol, in the City of Baton Rouge, on this the 3rd day of May, A. D., 1946.

(Signed) J. H. Davis, Governor of Louisiana. (Seal.)

By the Governor (Signed) Wade O. Martin, Jr., Secretary of State.

A true copy of the original attest:

(S.) E. L. Resweber, Sheriff of St. Martin Parish, La.

[fol. 13] IN SUPREME COURT OF LOUISIANA

No. 14287

STATE OF LOUISIANA ex Rel.,

vs.

E. L. RESWEBER, Sheriff of the Parish of St. Martin, Louisiana

PETITION FOR WRIT OF HABEAS CORPUS—Filed May 7, 1946

To the Honorable, the Supreme Court of the State of Louisiana:

The petition of the State of Louisiana on the relation of Willie Francis, a resident of the Parish of St. Martin, State of Louisiana, with respect represents:

1

That he is at the present time and for the past five days, confined in the Parish Prison of Iberia Parish in the City of New Iberia, Louisiana, within the jurisdiction of this Court, and that your relator is now unlawfully and illegally detained against his will and consent and deprived of his liberty in the said Parish Prison, and is in the illegal custody of E. L. Resweber, Sheriff of the Parish of St. Martin, who is without authority detaining relator and depriving him of his liberty.

2

That relator was indicted, convicted and sentenced to be electrocated for murder, all more fully set out under the cause entitled State of Louisiana vs. Willie Francis, No. 2161 of the Criminal Docket of the Parish of St. Martin, Louisiana.

3

That a mandatory Death Warrant was signed by His Excel-ency, James H. Davis, Governor of Louisiana on March 26, 1946, calling for the execution by electrocution of relator between the hours of 12 P. M. and 3 P. M. on the 3rd of May, 1946. Said warrant is now in the possession of E. L. Resweber, Sheriff of St. Martin Parish, Louisiana.

4

That relator Willie Francis in accordance with the said Death Warrant and on the said date at the said time was electrocuted by the officials of the State of Louisiana.

5

That relator lived through the electrocution and no further attempts were made on May 3rd, 1946 to kill him.

[fol. 14]

6

That the Death Warrant signed by the Governor of Louisiana on March 26, 1946 calling for the execution of relator on May 3rd, 1946 between the hours of 12 P. M. and 3 P. M. has been executed and this warrant is without further force and effect.

7

That a pretended order has been issued by the Governor and signed by him on May 3rd, 1946 ordering the execution of the aforesaid Death Warrant on May 9, 1946. That the said pretended order is in the possession of E. L. Resweber, Sheriff of St. Martin Parish.

8

That the said pretended order ordering the execution of relator on May 9, 1946 is absolutely null and void and without basis in law.

9

That relator is being held in the custody of E. L. Resweber, Sheriff of St. Martin Parish, Louisiana on the basis of said pretended order which is absolutely null and void.

10

Upon information and belief, relator avers that Sheriff E. L. Resweber, Parish of St. Martin, intends to have him electrocuted on May 9, 1946 on the basis of the said pretended order; that relator is and will be deprived thereby of his life and liberty without due process of law.

11

That no subsequent valid order or Warrant signed or to be signed by the Governor of Louisiana for the electrocution

of mover is or can be issued, that the sentence has been carried out and through an Act of God your petitioner Willie Francis has lived through said execution.

12

That relator Willie Francis was electrocuted on May 3, 1946 and has lived through the ordeal and any further electrocution or threat thereof constitutes cruel and unusual punishment in violation of the Constitution of the State of Louisiana.

13

That relator's imprisonment is not authorized by any order, decree, judgment or sentence of any Court, or by [fol. 14a] any provision of law, and that relator is desirous of regaining his liberty and to be released of his unauthorized and illegal imprisonment, and that a writ of Habeas Corpus is necessary in the premises.

14

That relator has applied to the 16th Judicial District Court for the Parish of St. Martin reciting the facts and allegations hereinabove stated and praying for a Writ of Habeas Corpus to issue; that said application for issuance of the Writ was denied by the Honorable James D. Simon, Judge of the 16th Judicial District Court.

15

That the said petition to the said District Court and its denial by Judge James D. Simon in the form of a certified copy is annexed hereto and made a part hereof.

Whereof, the premises and annexed affidavit considered, petitioner prays that a writ of Habeas Corpus issue herein to the person or persons in charge of the Parish prison wherein relator is confined, and particularly the Honorable E. L. Resweber, Sheriff of the Parish of St. Martin and the Honorable James D. Simon, Judge of the 16th Judicial District Court, be ordered to produce the body of petitioner in this Court on the — day of —, 1946 at the hour of — o'clock — M. and then and there a true and correct return make of the reason and cause of the detention of petitioner.

Petitioner further prays, that after due proceedings had,

that the Writ of Habeas Corpus issued be maintained, that petitioner be released from further confinement and prays for all other orders necessary in the premises, and for general and equitable relief.

By his Attorney (S.) Bertrand de Blanc.

[fol. 15] *Duly sworn to by Willie Francis. Jurat omitted in printing.*

ORDER DENYING WRIT OF HABEAS CORPUS

The application for issuance of the Writ herein sought is denied.

Officially at St. Martinville, La., May 7th 1946 at 4:30 P. M.

(S.) James D. Simon, Judge.

[File endorsement omitted.]

[fol. 16] IN SUPREME COURT OF LOUISIANA

[Title omitted]

PETITION FOR WRITS OF CERTIORARI, MANDAMUS, PROHIBITION AND HABEAS CORPUS

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the State of Louisiana:

The petition of the State of Louisiana on the relation of Willie Francis, a resident of the Parish of St. Martin, State of Louisiana, with respect represents:

1

That he is at the present time and since the 3rd of May, 1946 has been illegally confined to the Parish Prison of Iberia Parish in the City of New Iberia, Louisiana, within the jurisdiction of this Court, and that your relator is now unlawfully and illegally detained against his will and consent and deprived of his liberty in the said Parish Prison, and is in the illegal custody of E. L. Resweber, Sheriff of the Parish of St. Martin, who is without authority depriving him of his liberty.

2

That relator was indicted, convicted and sentenced to be electrocuted for murder, all more fully set out under the cause entitled State of Louisiana vs. Willie Francis, No. 2161 of the Criminal Docket of the Parish of St. Martin, Louisiana. A certified true copy of which is annexed hereto and made a part hereof as Exhibit "A".

3

That based upon the above proceedings a mandatory Death Warrant was signed by His Excellency, James H. Davis, Governor of the State of Louisiana on March 26, 1946 calling for the execution by electrocution of relator between the hours of 12 P. M. and 3 P. M. on the 3rd of May, 1946. Said warrant is now in the possession of E. L. Resweber, Sheriff of St. Martin Parish, Louisiana. A certified true copy of which is annexed hereto and made a part hereof as Exhibit "B.'

[fol. 17]

4

That relator Willie Francis in accordance with the said Death Warrant and on the morning of the 3rd. of May, 1946 was brought from the Iberia Parish Prison to the St. Martin Parish Prison. That between the hours of 12 P. M. and 1 P. M. relator was placed in the official electric chair of the State of Louisiana; that he was strapped thereto, that the necessary wires were attached to his body in the regular manner; that after all the necesary steps had been taken the official electrocutioner, an expert, turned on the switch and a current of electricity was caused to pass through the body of relator, all in the presence of the official witnesses.

5

That relator, through an act of God, lived through the electrocution and was then returned to the illegal custody of E. L. Resweber, Sheriff of St. Martin Parish, Louisiana.

6

That the officials acts regarding the electrocution recited above which took place on the 3rd. of May, 1946 constituted a "fait accomplis" and constituted a bar to any further attempts.

7

That the Death Warrant signed by the Governor of the State of Louisiana, His Excellency James H. Davis on March 26, 1946 calling for the execution of relator on May 3rd, 1946 between the hours of 12 P. M. and 3 P. M. has been executed and this warrant is without any further force and effect. A certified true copy of which is annexed hereto and made a part hereof as Exhibit "B".

8

That a pretended order has been issued by the Governor of the State of Louisiana, His Excellency James H. Davis and signed by him on May 3rd, 1946 ordering the execution of the aforesaid Death Warrant on May 9th, 1946. That the said pretended order is in the possession of E. L. Resweber, Sheriff of St. Martin Parish, Louisiana. A certified true copy of which is annexed hereto and made a part hereof as Exhibit "C".

[fol. 18] 9

That relator is being held in the custody of E. L. Resweber, Sheriff of St. Martin Parish, Louisiana on the basis of said pretended order which is absolutely null and void.

10

That since the filing of the original application for the Writ of Habeas Corpus, the Lieutenant Governor of the State of Louisiana, His Excellency J. Emile Verret, Acting Governor in the Absence of the Governor, granted to relator a 30 day stay of execution.

11

That upon information and belief, relator avers that upon the expiration of said 30 day stay of execution E. L. Resweber, Sheriff of St. Martin Parish, Louisiana, intends to have him electrocuted, that relator is and will be deprived of his life and liberty without due process of law guaranteed to him under the 14th. Amendment of the Constitution of the United States of America as well as Article 1, Section 2 of the Constitution of the State of Louisiana.

12

That no subsequent valid order or Warrant signed or to be signed by the Governor of Louisiana for the electrocution of mover is or can be issued, that the sentence has been carried out and through an Act of God relator Willie Francis has lived through said execution.

13

That relator Willie Francis was electrocuted on May 3, 1946 and has lived through the ordeal and any further electrocution or threat thereof constitutes cruel and unusual punishment in violation of the Constitution of the State of Louisiana, Article 1, Section 12.

14

Relator further avers that if he be subjected to another electrocution same constitutes a violation of Article 1, Section 9 of the Constitution of the State of Louisiana which provides that no person shall be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial or where there is a mistrial, or a motion in arrest of judgment is sustained none of which has been done by him.

[fol. 19]

15

That relator's imprisonment is not authorized by any order, decree, judgment or sentence of any Court, or by any provision of law, and that relator is desirous of regaining his liberty and to be released of his unauthorized and illegal imprisonment, and that a writ of Habeas Corpus is necessary in the premises.

16

That relator has applied to the Honorable James D. Simon, Judge of the 16th Judicial District Court for the Parish of St. Martin, Louisiana, praying for a Writ of Habeas Corpus to issue; that the said application for issuance of the Writ was denied by the Honorable James D. Simon, Judge of the said Court; That the said petition to the said Judge of the said Court and its denial in the form of a certified true copy is annexed hereto and made a part hereof as Exhibit "D".

That relator has given due notice to His Excellency James H. Davis, Governor of the State of Louisiana, the Honorable J. Emile Verret, Lieutenant Governor of the State of Louisiana, the Honorable James D. Simon, Judge of the 16th Judicial District Court, State of Louisiana, the Honorable Fred LeBlanc, Attorney General in and for the State of Louisiana, the Honorable L. O. Pecot, District Attorney in and for the 16th Judicial District Court, State of Louisiana, the Honorable E. L. Wesweber, Sheriff of the Parish of St. Martin, State of Louisiana, of relator's intention to apply to this Honorable Court for these writs of certiorari, prohibition and mandamus all in accordance with the law and the rules of this Honorable Court.

Wherefore, your relator prays that Writs of Certiorari, Mandamus and Prohibition issue commanding the Honorable James D. Simon, Judge of the 16th Judicial District Court to send up to this Court the original record or a certified copy of all proceedings had in the cause hereinabove mentioned and that upon due hearing a Writ of Habeas Corpus issue directing His Excellency James H. Davis, Governor of the State of Louisiana, the Honorable J. Emile Verret, Lieutenant Governor of the State of Louisiana, the Honorable James D. Simon, Judge of the 16th Judicial District Court, State of Louisiana, the Honorable Fred Le Blanc, Attorney General in and for the State [fol. 20] of Louisiana, the Honorable L. O. Pecot, District Attorney in and for the 16th Judicial District Court, State of Louisiana, the Honorable E. L. Resweber, Sheriff of the Parish of St. Martin, State of Louisiana, to produce the body of relator before said 16th Judicial District Court on — day of ——, 1946, at — o'clock — M. and then and there to show cause why relator is detained and why he should not be released; that an order issue prohibiting all of the above-named officials of the State of Louisiana from executing by electrocution relator Willie Francis until the final determination of the herein entitled and numbered cause.

Petitioner further prays, that after due proceedings had, that the Writ of Habeas Corpus issued be maintained, that petitioner be released from further confinement and prays for all other orders necessary in the premises, and for general and equitable relief.

(S.) Bertrand De Blanc, Attorney for Petitioner.

STATE OF LOUISIANA,
Parish of Orleans:

Before Me, —— ——, the undersigned authority personally came and appeared Bertrand De Blanc, Attorney at Law, who after being duly sworn did depose and say:

That he is the true and lawful attorney for the relator in the above and foregoing petition, that he prepared the same, that he gave notice of intention to apply to this Court for writs of certiorari, mandamus and prohibition in this case to His Excellency James H. Davis, Governor of the State of Louisiana, the Honorable J. Emile Verrett, Lieutenant Governor of the State of Louisiana, the Honorable James D. Simon, Judge of the 16th Judicial District Court, State of Louisiana, the Honorable Fred LeBlanc, Attorney General in and for the State of Louisiana, the Honorable [fol. 21] L. O. Pecot, District Attorney in and for the 16th Judicial District Court, State of Louisiana, the Honorable E. L. Resweber, Sheriff of the Parish of St. Martin, State of Louisiana, and delivery and service of a copy of this petition has been made on said above-named officials by registered mail; and that all the allegations therein contained are true and correct.

(S.) Bertrand De Blanc, Attorney for Petitioner.

Sworn to and subscribed before me this 9th day of May, 1946. (S.) Louis P. Niklaus. (Seal.)

[fol. 22] [File endorsement omitted]

IN SUPREME COURT OF LOUISIANA

[Title omitted]

SUPPLEMENTAL PETITION—Filed May 14, 1946

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the State of Louisiana:

The supplemental and amended petition of the State of Louisiana on the relation of Willie Francis, a resident of the Parish of St. Martin, State of Louisiana, in the

above entitled and numbered cause, with respect, represents:

1

That on May 9th, 1946 a petition of the State of Louisiana on the relation of Willie Francis, was filed in this Honorable Court applying for Writs of Certiorari, Mandamus, Prohibition, and Habeas Corpus in the cause entitled State of Louisiana Ex Rel. Willie Francis vs. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, Supreme Court of the State of Louisiana, No. —.

2

That under the facts recited therein relator is and will be denied his right of Due Process as guaranteed him under the following section of the 14th Amendment of the Constitution of the United States of America:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law;"

3

That under the facts recited therein relator is and will be denied his right against Double Jeopardy as guaranteed to him under the following section of the Fifth Amendment of the Constitution of the United States of America:

> "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;"

4

That under the facts recited therein relator is and will be subjected to cruel and unusual punishment contrary to the [fols. 23-24] 8th Amendment of the Constitution of the United States of America:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5

That relator desires to retain all rights of appeal and recourse to the Supreme Court of the United States of America on the Constitutional questions hereinabove presented.

Wherefore, this supplemental and the original petition considered relator prays that the Writs of Certiorari,

Mandamus, Prohibition be issued and maintained as prayed for, and all general and equitable relief.

(S.) Bertrand de Blanc, Attorney for Relator.

STATE OF LOUISIANA,
Parish of St. Martin:

Before me the undersigned authority, personally came and appeared Bertrand de Blanc, Attorney at Law, who being by me duly sworn, did depose and say:

That he is the true and lawful attorney for the relator in the above and foregoing supplemental and amended petition, that he prepared the same, that delivery and service of a copy of this supplemental and amended petition has been made by registered mail on His Excellency James H. Davis, Governor of the State of Louisiana, the Honorable J. Emile Verret, Lieutenant Governor of the State of Louisiana, the Honorable James D. Simon, Judge of the 16th Judicial District Court, State of Louisiana, the Honorable Fred LeBlanc, Attorney General in and for the State of Louisiana, the Honorable L. O. Pecot, District Attorney in and for the 16th Judicial District Court, State of Louisiana, the Honorable E. L. Resweber, Sheriff of the Parish of St. Martin, State of Louisiana, and that all the allegations therein contained are true and correct.

(S.) Bertrand de Blanc.

Sworn to and subscribed before me this 13th day of May, 1946. (S.) Paul S. Daspit, Jr., Notary Public. (Seal.)

[fol. 25] [File endorsement omitted]

IN SUPREME COURT OF LOUISIANA

[Title omitted]

ANSWER—Filed May 13, 1946

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the State of Louisiana:

And now into Court, in answer to and in opposition to plaintiff's petition, comes His Excellency James H. Davis, Governor of the State of Louisiana; Honorable J. Emile

Verret, Lieutenant Governor of the State of Louisiana and Honorable Fred S. LeBlanc, Attorney General of the State of Louisiana, herein appearing through their undersigned counsel, M. E. Culligan, Special Assistant Attorney General of the State of Louisiana and Honorable E. L. Resweber, Sheriff, Parish of St. Martin, herein appearing through L. O. Pecot, District Attorney and L. O. Pecot in proper person, and for answer to plaintiff's petition with respect shows:

I

Respondents admit that petitioner is and has been since May 3, 1946 in the Parish Prison of Iberia Parish but deny that he is unlawfully and illegally detained, as he is in the legal custody of Honorable E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana.

II

This allegation is admitted.

III

Respondents admit, that as set forth by petitioner, a mandatory death warrant was signed by His Excellency James H. Davis, Governor of the State of Louisiana, on March 26, 1946, commanding the execution by electrocution of the petitioner between the hours of 12:00 Noon and 3:00 P. M., on the third day of May, 1946, which said warrant [fol. 26] was cancelled on May 8th, 1946, and recalled on the same date by His Excellency J. Emile Verret, Lieutenant Governor, and, then, Acting Governor of the State of Louisiana.

IV

Respondents admit all necessary preparatory steps had been taken to cause the death of petitioner by electrocution in accordance with Article 569 of the Louisiana Code of Criminal Procedure as amended by Act 14 of 1940, but that through an latent electrical defect, no electric current reached the body of the petitioner, and his death did not and has not occurred.

V

Respondents admit that the petitioner is still living and is in the legal custody of Honorable E. L. Resweber, Sheriff, St. Martin Parish, Louisiana.

VI

Respondents deny this allegation, as the sentence of death has not been executed, nor has the petitioner been executed.

VII

Respondents deny that the Governor's warrant of March 26, 1946, has been executed, and informs this Honorable Court that the said warrant was cancelled on May 8, 1946.

VIII

Respondents deny that any "pretended" order was issued and submit that Exhibit "C", attached to plaintiff's petition, speaks for itself.

IX

This allegation is denied, as petitioner is being held under commitment and sentence of the 16th Judicial District Court, awaiting the execution thereof by His Excellency, the Governor.

X

Respondents admit a legal reprieve was granted by His Excellency, Lieutenant Governor J. Emile Verret, Acting Governor at the time of the issuance thereof, namely, May 8th, 1946, staying the execution of the sentence imposed [fol. 27] by the 16th Judicial District Court until after June 7th, 1946, a copy pf which reprieve is attached.

XI

This allegation is denied. Honorable E. L. Resweber, Sheriff, will execute the sentence of death strictly in accordance with law.

Respondents further deny that this petitioner or any other person will ever be deprived by respondents of their life or their liberty without due process of law and will at all times fulfill their oath to uphold the Constitution of the United States, the laws of the United States and the Constitution and laws of the State of Louisiana.

XII

Respondents admit that petitioner is alive and deny that the sentence of death imposed by the 16th Judicial District Court has been executed and submit that it is the mandatory

duty of His Excellency, the Governor of Louisiana, to have such sentence executed, subject only to the provisions of Article 5, Sec. 10 of the Constitution of Louisiana, for the year 1921.

XIII

Respondents deny that the petitioner was electrocuted, and submit the sentence of death has not been executed.

Respondents further deny that the execution of the death sentence, upon the expiration of the reprieve, violates Article 1, Sec. 12 of the Constitution of Louisiana, 1921.

This Article of our Constitution is a replica of Amendment #8 of the United States Constitution (which is not binding on State Courts), and in construction of these exact words it was held that a sentence within the limits prescribed by statutes for an offense will not ordinarily be regarded as, "cruel and unusual punishment".

Bailey v. U. S., C. C. A. Okl., 74 F. (2d) 451, 452;
Welch v. Hudspeth, C. C. A. Kan., 132 F. (2d) 434, 436;
Moore v. Aderhold, C. C. A. Kan., 108 F. (2d) 729.

[fol. 28] Death by electrocution is not a cruel or inhuman mode of punishment.

(Hart v. Commonwealth, 109 S. E. 582, 587, 131 Virginia 726);
(People v. Durston, 24 N. E. 6, 7, 119 New York 569);
(State v. Tomassi, 69 A. 214, 217, 75 New Jersey L. 739);

and Your Honors have held that the infliction of death by electrocution is more humane and less painful than by hanging.

State ex rel. Pierre v. Jones, 200 La. 809, 9 So. (2d) 42, and in which the U. S. Supreme Court denied writs, 63 S. Ct. 64, 87 L. Ed. —.

Defendant "is not entitled to be discharged because he stands validly convicted and sentenced to death and cannot legally complain of the death penalty being inflicted by means of electrocution under a constitutional statute providing for that method or mode of execution".

(State v. Jones, supra.)

XIV

Respondents deny that the execution of the sentence of death upon expiration of the reprieve will violate Article 1, Sec. 9 of the Constitution of the State of Louisiana (1921). This Article reads in part as follows:

> "* * * nor shall any person be twice put in jeopardy of life or liberty for the same offense * * *"

As is clearly shown by the Article itself, "jeopardy" means the placing of a person upon his trial twice for the same offense.

In Rosser v. Commonwealth, 167 S. E. 257, 259, 159 Va. 128, it was held that "jeopardy", within rule against double jeopardy, means danger of conviction. Const., Bill of Rights, Sec. 8.

"Jeopardy" applies not to execution of the sentence, but only to a trial upon the same offense.

In State v. Yokum, 155 La. 846, 875, Your Honors held:

> [fol. 29] "'Jeopardy' is used in our state Constitutions to designate the danger of conviction and punishment which a defendant in a criminal prosecution incurs, when a valid indictment has been found, or a valid information or complaint presented, and a petit jury has been impaneled and sworn to try the case and to give a verdict in a court of competent jurisdiction."

XV

Respondents deny this Article and submit that petitioner is legally in custody of Sheriff E. L. Resweber, St. Martin Parish, Louisiana, pending the execution of the sentence of the 14th Judicial District Court, according to law.

XVI

Respondents admit this allegation.

XVII

Respondents admit they have received copy of plaintiff's petition.

Further answering, respondents, His Excellency James H. Davis, Governor of the State of Louisiana; Honorable J. Emile Verret, Lieutenant Governor of the State of Louisi-

ana; Honorable Fred S. LeBlanc, Attorney General of the State of Louisiana and Honorable L. O. Pecot, District Attorney for the 16th Judicial District, do not have the custody of petitioner; the petitioner being in the custody of your respondent H. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, and that petitioner's application should be denied for the following reasons, to-wit:

(a) The 16th Judicial District Court had jurisdiction over the crime for which petitioner was convicted.

(b) Murder, the crime with which petitioner stands convicted, is a felony.

(c) Petitioner was legally indicted for the crime of murder.

(d) Petitioner was legally tried by a Jury for his crime.
[fol. 30] (e) A legal verdict was returned by the Jury.

(f) A legal sentence was imposed by the Court and which sentence is still in full force and effect.

(g) No appeal was taken.

(h) Application to the Board of Pardons was denied.

(i) The legal method of death is fixed by the Legislalature.

(j) A legal warrant commanding the execution of relator by the legal method of death was issued by the Governor.

(k) The sentence of death imposed by the Court is the legal penalty fixed by the law, and which sentence it is the mandatory duty of the Governor to execute; it is then the mandatory duty of the Sheriff to cause the execution to be done upon the person of the relator as commanded in the warrant of the Governor.

(l) The warrant of death, previously issued by the Governor, has been cancelled and recalled on May 8th, 1946, and a reprieve granted on the same date, staying execution of the petitioner until after June 7th, 1946.

(m) Petitioner is now held under legal commitment of the 16th Judicial District Court under sentence and judgment rendered on September 14th, 1945.

(n) The Supreme Court can not revise the sentence of the District Court, or commute the sentence.

(o) The District Court is clothed with the sound discretion to refuse to grant the writ of habeas corpus and properly exercised such discretion, the sentence of that court being in full force and effect until the sentence is executed by the warrant of the Governor and execution done upon the person of the petitioner by the Sheriff.

[fols. 31-32] Wherefore, petitioners pray that plaintiff's petition be dismissed.

Respectfully submitted, Signed M. E. Culligan, Special Assistant Attorney General for the State of Louisiana and Attorney for Respondents, James H. Davis, Governor; J. Emile Verret, Lieutenant Governor and Fred S. LeBlanc, Attorney General. L. O. Pecot, by M. E. Culligan, L. O. Pecot, in P. P. L. O. Pecot, by M. E. Culligan, L. O. Pecot, District Attorney for the 16th Judicial District, Parish of St. Martin and Attorney for Respondent. E. L. Resweber, Sheriff, St. Martin Parish.

Duly sworn to by M. E. Culligan. Jurat omitted in printing.

A copy of this answer and opposition has been sent by Registered Mail, addressed to Mr. Bertrand DeBlanc, Attory for Petitioner, St. Martinville, Louisiana.

[fol. 33] IN SUPREME COURT OF LOUISIANA

[Title omitted]

ANSWER

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the State of Louisiana:

Now comes, James D. Simon, Judge of the Sixteenth Judicial District Court in and for the Parish of St. Martin, Louisiana, made respondent in the above styled and numbered matter, and avers:

First

That the prayer of the Petition herein, seeking the issuance of a Writ of Habeas Corpus to be directed, among

others, to your Respondent, avers that your respondent in his official capacity:

> "* * * produce the body of relator before said 16th Judicial District Court on — day of —, 1946, at — o'clock —M., and then and there to show cause why relator is detained and why he should not be released; that an order issue prohibiting all of the above-named officials of the State of Louisiana from executing by electrocution relator Willie Francis until the final determination of the herein entitled and numbered cause."

Second

Your respondent shows that the body and person of the relator is not within the custody of your respondent either as Judge of the Sixteenth Judicial District Court or otherwise. That the relator herein is within the custody and control of the Executive Department of our State Government, and that pending the execution of a sentence lawfully imposed the Judiciary Department or the Court imposing the sentence, either in fact or law, exercises no detention of the prisoner.

Third

That the execution of a sentence imposed by a Court of this State is vested absolutely and exclusively within the province and authority of the Executive Department of this State, and in which the Judiciary has no legal or constitutional right or duty of participation, subject only, how- [fol. 34] ever, to the right of judicially inquiring, upon proper showing, whether a prisoner is lawfully deprived of his liberty, to discharge him if unlawfully held, or if lawful to remand him into the custody of the Executive Department for the execution of the sentence imposed.

Your respondent, for the reasons aforestated, submits with all due respect, that the petition herein fails to show a Right or Cause of Action as to him and that he should be dismissed from said proceedings.

Respectfully submitted, (S.) James D. Simon, Judge
Sixteenth Judicial District of Louisiana.

[fol. 35] IN SUPREME COURT OF LOUISIANA

No. 38,219

No. 38,221

STATE OF LOUISIANA ex rel. WILLIE FRANCIS

v.

E. L. RESWEBER, Sheriff, et al.

In re Willie Francis Applying for Writ of Certiorari, Prohibition, Mandamus and Habeas Corpus

Signed C. A. O'N, W. G. R., J. B. F., A. L. P., J. B. A., F. W. H., R. F. K.

DECISION—May 15, 1946

Per CURIAM:

The relator, Willie Francis, was convicted of the crime of murder and was sentenced to suffer the penalty of death. The Governor issued the death warrant on March 29, 1946, directing the sheriff to cause the sentence to be executed on the 3rd day of May 1946, between the hours of 12:00 o'clock noon and 3:00 o'clock p. m. The warant directed and ordered the sheriff to cause the sentence to be carried out by electrocution, that is, by "causing to pass through the body of the said Willie Francis a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the said Willie Francis until said Willie Francis is dead." The warrant was worded according to articles 569 and 570 of the Code of Criminal Procedure, as amended by Act 14 of 1940, adopting electrocution as the method of executing a sentence of death.

On the day set for the execution, May 3, 1946, between the Hours of 12:00 o'clock noon and 3:00 o'clock p. m., Willie Francis was strapped in the electric chair and an attempt was made to electrocute him, but, because of some defect in the apparatus devised and used for electrocutions, the [fol. 36] contrivance failed to function, and after an unsuccessful attempt to electrocute Francis he was removed from the chair. On that day, the Governor granted a reprieve until May 9, 1946, declaring that the ends of justice would be

served if the execution of the death warrant should be stayed and a reprieve granted until May 9, 1946.

On the 7th day of May, Willie Francis, represented by an attorney at law, filed a petition in the district court, setting forth substantially the facts which we have related and praying for a writ of habeas corpus to be directed to the sheriff to produce him, Willie Francis, in court and to show cause why he should not be released from custody. The judge of the district court denied the petition for a writ of habeas corpus. On the next day, May 8, 1946, Willie Francis, represented by two other attorneys at law, filed another petition in the district court praying for a writ of habeas corpus, directed to the sheriff, commanding him to produce Willie Francis before the court, to be released from custody. The judge of the district court again denied the petition for a writ of habeas corpus.

On the same day, May 8, 1946, the relator filed a petition in this the Supreme Court, and on the next day filed another petition in this court, praying for writs of certiorari, prohibition, mandamus and habeas corpus. In his petitions to this court, the relator sets forth all of the facts which we have recited, and contends, as he contended in his petitions to the district court, that a refusal to grant him a writ of heabeas corpus and to order his execution stayed would be a denial of due process of law and of the equal protection of laws, as guaranteed by the 14th amendment of the Constitution of the United States and by Section 2 of Article I of the Constitution of this State. He contends further that he was electrocuted on May 3, 1946, and that, considering the ordeal to which he was subjected then, any further electrocution would constitute cruel and unusual punishment, in violation of Section 12 of Article I of the Constitution, and would be violative also of Section 9 of Article I of the Constitution, providing that no person shall be put in jeopardy of life or liberty twice for the same offense.

In his petitions invoking the supervisory jurisdiction of this court the relator prays that the writs which he asks for be directed to the District Judge, to the Sheriff having [fol. 37] the relator in custody, to the Governor of Louisiana, and the Lieutenant Governor, acting Governor in the absence of the Governor from the state, to the Attorney General, and to the District Attorney who prosecuted the relator.

Inasmuch as it was impossible for this court to give consideration to the petitions before the hour of 12 o'clock noon on May 9, 1946, the court requested the Lieutenant Governor, acting Governor, to grant a reprieve for a period not exceeding 30 days; and on that request the Lieutenant Governor, acting Governor, granted the reprieve until 12 o'clock noon, Friday, June 7, 1946. Meanwhile, copies of the petitions to this court were served upon or furnished to the officials to whom the relator asks to have the writs directed.

Attached to one of the petitions of the relator, invoking the supervisory jurisdiction of this court, are certified copies of all of the proceedings had in the prosecution in the district court, including the original affidavit, the indictment, and so on down to and including the pronouncing of the death sentence. There is no irregularity shown in any of these proceedings. In fact the relator does not contend that there was any irregularity in the indictment, trial, conviction or sentence. His only complaint has reference to the intention of the executive authorities to make a second attempt to carry out the death sentence; and the reasons for his complaint are founded solely upon his having been placed in the electric chair and having been subjected to the attempt to electrocute him on May 3, 1946.

The judge of the district court, in his answer or opposition to relator's petitions, avers that the relator is not in the judge's custody but in the custody of the sheriff, and therefore the relator shows no cause or right of action as to him, the judge. He avers that the execution of the sentence in this case is a matter vested exclusively in the province and authority of the executive department of the state, and in which the judiciary has no constitutional right to interfere, under the facts disclosed in the relator's petition.

An answer or opposition to the relator's petitions was filed by the district attorney for himself and for the sheriff, [fol. 38] and by an assistant attorney general for the state officials against whom the writs are asked for. In this latter answer or opposition it is admitted that the attempt was made to electrocute Willie Francis on May 3, 1946, in obedience of the death warrant, but it is averred that through some latent electrical defect in the apparatus, no electric current reached the body of Willie Francis and for that reason the sentence of death was not carried out. We have no other evidence, of course, as to whether an electric

current did reach the body of Willie Francis. The important fact, however, is that a current of sufficient intensity to cause death, as required by the statute on the subject, and by the death warrant, did not pass through the body of Willie Francis. These respondents or opponents therefore aver that it is the duty of the Governor to have the death sentence carried out, his authority in that respect being subject only to the provisions of Section 10 or Article V of the Constitution, giving him authority to grant pardons or to commute sentences on the recommendation of the Board of Pardons or of any two members thereof. It is averred in this answer or opposition that the inhibition against the inflicting of cruel and unusual punishment, in Section 12 of Article I of the State Constitution, is a replica of the 8th Amendment of the Constitution of the United States, which is applicable to the Federal Courts; and that that amendment has been so construed by the courts that the phrase "cruel and unusual punishment" is not appropriate to the extraordinary circumstances of this case. Hence it is denied that the electrocution of Willie Francis would be cruel and unusual punishment by reason of the attempt to electrocute him made on May 3, 1946.

The respondents or opponents deny also that to electrocute Willie Francis would violate the provision in Section Article I of the Constitution, means the danger of a person shall be twice put in jeopardy of life or liberty for the same offense. Decisions are cited to support the proposition that the word "jeopardy", as used in Section 9 of Articles I of the Constitution, means the danger of a person's being convicted twice for the same offense; hence it is argued that the guaranty against putting a person's life or liberty in jeopardy twice for the same offense has no application to the extraordinary happening in this case.

[fol. 39] Our conclusion is that the complaint made by the relator is a matter over which the courts have no authority. Inasmuch as the proceedings had in the district court, up to and including the pronouncing of the sentence of death, were entirely regular, we have no authority to set aside the sentence and release the relator from the sheriff's custody. And the court certainly has no authority to pardon the relator or to commute his sentence. The only authority to grant a pardon or to commute a sentence is vested in the Governor; and his authority in that respect may be exercised only upon the recommendation of the Board of Par-

dons or of any two members thereof. It is so declared in Section 10 of Article V of the Constitution of this State.

On the 14th of May 1946, after we had written our conclusion to refuse to grant the writs prayed for by the relator, and our reasons for that conclusion, he filed in this court a supplemental petition in which he again invokes the due-process clause in the 14th Amendment of the Constitution of the United States, and invokes the 5th Amendment, declaring "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", and the 8th Amendment, declaring "nor (shall) cruel and unusual punishments (be) inflicted".

We have found already that there is no violation of the due-process clause of the 14th Amendment involved in this case,

With regard to the 5th Amendment and the 8th Amendment of the Constitution of the United States it is too well settled by the decisions of the Supreme Court of the United States to require citation of these decisions that neither the 5th nor the 8th Amendment has reference to proceedings in the state courts. The prohibitions contained in these amendments, in fact the prohibitions contained in the first ten amendments were not designed as limits against the state governments in reference to their own citizens but as limits upon the Federal power only.

For the reasons stated, the writs of certiorari, prohibition, mandamus and habeas corpus, applied for by the relator, are refused.

Clerk's Certificates to foregoing papers omitted in printing.

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 10, 1946

On Consideration of the motion for leave to proceed *in forma pauperis* herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration or decision of this motion.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 10, 1946

The petition herein for a writ of certiorari to the Supreme Court of the State of Louisiana is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on Cover: In forma pauperis. File No. 51,005. Louisiana, Supreme Court. Term No. 142. State of Louisiana, ex rel. Willie Francis, Petitioner, vs. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al. Petition for a writ of certiorari and exhibit thereto. Filed June 4, 1946. Term No. 142 O. T. 1946.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 28 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 142

STATE OF LOUISIANA, EX REL. WILLIE FRANCIS,
Petitioner,

vs.

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF IN BEHALF OF PETITIONER

J. SKELLY WRIGHT,
BERTRAND DE BLANC,
ROBERT E. KLINE, JR.,
JOHN L. INGOLDSBY, JR.,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 142

STATE OF LOUISIANA, EX REL. WILLIE FRANCIS,
Petitioner,

vs.

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

I

Jurisdiction

The Supreme Court of Louisiana in an unwritten per curiam opinion denied petitioner's application for writs of certiorari, mandamus, prohibition and habeas corpus. The opinion of the Supreme Court of Louisiana is included in the record filed with this Court, beginning at page 27.

Supreme Court of the United States has authority by virtue of Title 28, Section 344b of the U. S. Code to require that this case be certified to it for review and determination for the reason that the petitioner has been

denied protection of the due process clause of the 14th Amendment of the Constitution of the United States.

On June 10, 1946 this court granted the petition for a writ of certiorari to the Supreme Court of the State of Louisiana.

Statement of the Case

On September 13, 1945 the petitioner, Willie Francis, a Negro, was convicted under an indictment charging the murder of a white man and on September 14, 1945 was sentenced to suffer death in the manner provided by law by the judge of the District Court for the Parish of St. Martin, State of Louisiana (R. 6). At the time of the alleged murder Francis was 15 years old. He was tried and convicted eight days after the indictment was returned against him (R. 5). He was represented at the trial by counsel appointed by the court (R. 2) and the evidence introduced against him consisted primarily of his own alleged confession. No evidence whatever was introduced at the trial in behalf of the defendant (R. 5) and no appeal of any kind was taken to any appellate court asking the reversal of the conviction (R. 24). No stenographic record was taken of the trial so apparently no appeal was anticipated. (For the prosecuting attorney's version of what evidence was introduced at the trial, see Appendix 1.)

A warrant commanding the execution by electrocution of the petitioner on May 3, 1946 was issued by the Governor of the State of Louisiana (R. 6), and Francis was prepared for death. He was shaved in the appropriate places, (top of head, wrists, legs), in order that the connecting parts of the electric chair might be firmly fastened to his body to insure the proper entry of the electric current, and he was given the last rites of his church (App. 3). He was given his last meal. At noon on May 3, 1946, he was marched to the electrocution chamber where he was placed

in the electric chair (App. 2). The connecting apparatus was firmly fitted to his body in the appropriate places; he was strapped to the chair and a hood placed over his eyes (App. 2); he was asked if he had anything to say before he died (App. 3); he was given the final blessing by his priest in the presence of the official witnesses to electrocution (App. 3). On a given signal the current of electricity of sufficient intensity to cause death was applied, and then re-applied to the body of the petitioner. (App. 5). The lips of the petitioner puffed out, and he groaned and jumped so that the electric chair rocked on the floor (App. 2, 3, 4, 5). When it was evident that the electricity was not bringing death to the petitioner, the eletcric switch was turned off, and the petitioner was taken from the chair (App. 2, 3).

The Governor of the State of Louisiana was advised of the petitioner's failure to die in the electric chair, and the Governor ordered a "reprieve" until May 9, 1946 (R. 8). On May 7th, the petition for writ of *habeas corpus* was filed in behalf of Willie Francis in the District Court of the Parish of St. Martin, State of Louisiana, which application was denied the same day (R. 12). On May 9th, a petition for writs of certiorari, mandamus, prohibition and habeas corpus was filed in behalf of Willie Francis in the Supreme Court of the State of Louisiana (R. 17) and on May 14, 1946 a supplemental petition was filed alleging that a second attempt to execute Willie Francis would be in violation of the due process clause of the 14th Amendment of the Constitution of the United States (R. 19). Pending the disposition of the various petitions for writs of certiorari and habeas corpus the execution of Willie Francis has been stayed by the Governor of the State of Louisiana and by this court.

Specification of Errors

SUPREME COURT OF LOUISIANA ERRED IN HOLDING THAT A SECOND ATTEMPT TO ELECTROCUTE PETITIONER WOULD NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

II

SUPREME COURT OF LOUISIANA ERRED IN HOLDING THAT THE PROCEEDINGS HAD IN THE DISTRICT COURT OF THE PARISH OF ST. MARTIN, STATE OF LOUISIANA, IN WHICH THE PETITIONER WAS TRIED, CONVICTED AND SENTENCED TO DEATH WERE "ENTIRELY REGULAR" AND NOT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

I

Supreme Court of Louisiana erred in holding that a second attempt to electrocute petitioner would not violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The simple question presented by this specification of error is whether the petitioner, as a condemned man, had the right, under the due process clause of the 14th amendment to the Constitution of the United States to a humane execution producing instant, painless death or may the State of Louisiana, through design or otherwise, torture the petitioner physically and mentally with lingering death. If the petitioner has a right as a condemned man to a humane execution, there has been a denial of such right in this case through the unsuccessful attempt to execute him on May 3, 1946. A further question presents itself in the event this Court finds that there has been a denial

of a right protected by the due process clause of the 14th Amendment. Is the denial of such right in this case a bar to further punishment of any kind or must the petitioner be resentenced by the Trial Court to a punishment less than death?

The issue in this case transcends the question of whether the double jeopardy and cruel and unusual punishment provisions of the 5th and 8th amendments respectively are included in the modern concept of those rights protected by the due process clause of the 14th Amendment. There can be no doubt that the due process clause of the 14th Amendment protects many of the rights from State interference which are likewise protected from Federal interference by the first eight amendments and that the modern tendency is to extend and to increase these rights. *Powell* v. *Alabama*, 287 U. S. 45. This Court has observed this modern tendency by reversing previous decisions which sought to limit the rights protected by the 14th Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233. The modern view is that those fundamental rights which inhere in the citizen of a free government are protected by the 14th Amendment against State interference whether or not the identical rights are protected against Federal interference by the first eight amendments. *De Jonge* v. *Oregon*, 299 U. S. 353, *American Jurisprudence*, Vol. 11, page 1089.

In *Twining* v. *New Jersey*, 211 U. S. 78, this Court outlined a test to determine whether or not a right is protected by the due process clause of the 14th Amendment.

> "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such government? If it is and if it is of a nature that pertains to process of law this court has declared it to be essential to due process of law."

Following this test in decision after decision this Court has laid down the rule which is now an accepted and settled principle that the due process clause requires that State action shall be consistent with the fundamental principles of justice and liberty which lie at the basis of our civil and political institutions.

De Jonge v. *Oregon*, 299 U. S. 353, 81 L. Ed. 278, 57 Sup. Ct. 255;

Grosjean v. *American Press Co.*, 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444;

Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 ALR 406;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 ALR 527;

Hebert v. *Louisiana*, 272 U. S. 312, 71 L. Ed. 270, 48 ALR 1102;

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 ALR 375.

This Court has seen fit to define due process of law by a system of inclusion and exclusion based on the fundamental principles of justice and liberty above outlined rather than to form a hard and fast rule applicable in all cases. *Brown* v. *New Jersey*, 125 U. S. 172. What is due process depends on circumstances varying with the subject matter and the necessities of the situation. *Moyer* v. *Peabody*, 212 U. S. 78. In other words, the facts of each case determine whether or not there has been a violation of the 14th Amendment and a decision of this Court is restricted to those facts.

This appeal presents for the first time the simple question: has a condemned man a right to die humanely; may a state, through design or blunder, prolong his physical or mental suffering?

While this court has held on various occasions that capital punishment as such is not so offensive to our primary concepts of liberty and justice that it violates the due process clause of the 14th Amendment (*In re Kemmler*, 136 U. S. 436), in all of those cases this court has been careful to point out that the form of capital punishment must be humane; that it must be as painless and instant as possible. *Wilkerson* v. *Utah*, 99 U. S. 130. Plainly written in the decisions of this court is an absolute prohibition against the use of mediaeval forms of torture in accomplishing death. *Wilkerson* v. *Utah*, 99 U. S. 130, *supra*. No one will seriously urge that the due process clause of the 14th Amendment will not prevent a state from indulging in the use of a rack or other forms of lingering death. No one will seriously urge that a state may unduly prolong the mental or physical suffering of a condemned man.

There can be no doubt that in this case the physical and mental suffering of the petitioner has been prolonged and the only question is whether or not he must continue to suffer the impending punishment of death. Assuming that the prolongation of the suffering, the physical and mental torture of the petitioner, is not the result of design or intention on the part of the State of Louisiana; assuming that this torture is the result of blundering on the part of agents of the State of Louisiana, is this petitioner without recourse? Is he deprived of his right to a humane death because the state has made a mistake? Must he pay for the mistakes of the State of Louisiana? Must he continue to suffer and perhaps be further tortured? Is there any guaranty that a second attempt to execute this man will be any more effective than the first? How many tries does the State get before the due process clause of the 14th Amendment can be used to protect the petitioner from further torture? All these are questions which are inherent in

this present appeal and the petitioner submits that there is but one answer. As a human being, as a citizen of the State of Louisiana and of the United States, if he must die, he has a right to die humanely. He cannot be chopped at or picked upon or mentally or physically tortured beyond his endurance. The State of Louisiana had a right to execute this man but this right has been forfeited by subjecting the petitioner to the torture, both mental and physical, of being prepared for death, of being placed in the electric chair, of having electricity applied to his body.

No living being can tell how close to death the petitioner actually came. There can be no doubt that the electric chair had been tested and found in proper operating condition prior to the moment when the petitioner was placed therein. A current of electricity sufficient to cause death was applied. The petitioner jumped. The chair moved. His lips puckered and swelled. What effect that current of electricity had on this man's mind or upon his soul no one will ever know. No one on this earth can tell how close to the hereafter Willie Francis actually was at the time that current of electricity was applied to his body. No living being can appreciate the suffering, the torture, both physical and mental, that Willie Francis has already undergone. No other living being has been so close to death and through no fault of his own brought back into this life so that the State of Louisiana may give a repeat performance.

It is submitted that in this age of enlightened justice, admitting that a man may be brought to death in expiation of a crime, that death must not be one of torture. If the State of Louisiana had a right to execute Willie Francis she was bound at her peril to make his death as instant and painless as possible. By her failure to do so she has forfeited her right to his life.

The question remaining is whether the State of Louisiana, having forfeited her right to the life of Willie Francis, can

now subject him to another form of punishment consistent with our fundamental concepts of justice and liberty as protected by the 14th Amendment.

II

Supreme Court of Louisiana erred in holding that the proceedings had in the District Court of the Parish of St. Martin, State of Louisiana, in which the petitioner was tried, convicted and sentenced to death were "entirely regular" and not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The trial of Willie Francis was a farce and a travesty on justice. Counsel was appointed by the court to represent this Negro who was charged with killing one of the white citizens of the town of St. Martinsville. No attack on indictment was filed by petitioner's counsel. No motion for change of venue was introduced at the trial in behalf of the defendant; no evidence was introduced in his behalf at the trial; and no appeal whatever was taken from the judgment of conviction—not even a motion for a new trial. Within eight days after the indictment was returned against him the petitioner was tried, convicted and sentenced to death.

This court can never know the full story of the trial of Willie Francis because *no stenographic record was taken at the trial.* Obviously no appeal was contemplated and there was none. It is submitted that the abysmal darkness which shrouds the trial of Willie Francis speaks no less eloquently than the efforts made in his behalf both before and after that trial by the counsel appointed by the court to represent him.

In *Powell* v. *Alabama,* 287 U. S. 45, this Court had occasion to consider a situation similar to the present case. There the trial court appointed counsel for the accused under cir-

cumstances which made his services ineffective. This court, in reversing judgment of the Supreme Court of Alabama, stated on page 58:

> "'The record indicates that the appearance (of counsel appointed by the Court) was rather *pro forma* than zealous and active.' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities."

and at page 71

> "In the light of facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."

and again at page 71

> "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no

member of the Union may disregard.' Holden *v.* Hardy, 169 U. S. 366, 42 L. Ed. 780, 180 S. Ct. 383 supra."

Other decisions of this court sustaining the right of a defendant to adequate representation by counsel in a serious criminal case are *Brown* v. *Mississippi*, 297 U. S. 278 and *House* v. *Mayo*, Mem. Op. 322 U. S. 710, 64 S. Ct. 1058, 88 L. Ed. 1553. (See also *Downer* v. *Dunaway*, 52 F. (2d) 586.)

The supreme courts of the various states have followed this Court in holding that mere *pro forma* representation by counsel appointed by the court of a defendant in a serious criminal case amounts to a denial of due process. In *Williams* v. *State*, 192 Ga. 247, the Supreme Court of the State of Georgia, in reversing a conviction stated:

> "If appointed attorneys are so ignorant, negligent, or unfaithful that the accused was virtually without representation, or did not in any real or substantial sense have the aid of counsel, he would be deprived of a fundamental right."

In *Wilson* v. *State*, 222 Ind. 63, the Supreme Court for the State of Indiana, also in reversing a conviction, stated:

> "Mere perfunctory action by an attorney assuming to represent one accused of crime, which falls short of presenting the evidence favorable to him and invoking the rules of law intended to prevent conviction for an offense of which the accused is innocent, or the imposition of a penalty more severe than is deserved, should not be tolerated.
>
> "Where there has been such a lack of representation of defendant by counsel as to be equivalent to or worse than no representation at all, and as a result thereof the judge misused the opportunity thus given to impress upon the jury his view that the defendant was guilty and ought to be convicted, appellate court would

remand the cause for such a trial as would not deny but would afford to defendant the protection of his constitutional rights."

Conclusion

For the reasons above set forth petitioner submits that the judgment of the Supreme Court of the State of Louisiana should be reversed and that

1. The petitioner should be set free, or

2. The case should be remanded to District Court for the Parish of St. Martin, State of Louisiana, for resentence to a punishment less than death, or

3. The case should be remanded to the District Court for the Parish of St. Martin, State of Louisiana, for retrial.

J. Skelly Wright,
1025 Connecticut Avenue,
Washington 6, D. C.,
Bertrand De Blanc
227 West Main Street,
Lafayette, Louisiana,
Robert E. Kline, Jr.,
Munsey Building,
Washington, D. C.,
John L. Ingoldsby, Jr.,
1025 Connecticut Avenue,
Washington 6, D. C.,
Attorneys for Petitioner.

APPENDIX 1

Examination of L. O. Pecot, District Attorney for St. Martin's Parish before Board of Reprieves and Pardons, State of Louisiana.

"Attorney De Blanc: Mr. Pecot, you were the District Attorney who prosecuted Willie Francis in this case?

A. Yes, sir.

Q. Did Willie Francis employ a lawyer?

A. He did not. Judge Simon asked him if he had a lawyer and he appointed attorneys to represent him.

Q. Two attorneys were appointed to represent him because he did not have funds?

A. He did not have sufficient funds at that time.

Q. Do you recall approximately how many witnesses were called to testify against Willie Francis?

A. I don't know but I summoned every possible person connected with this case—connected with the circumstances—I think 12 or 15. Most of them testified as to the confession. There were other facts such as the finding of the pistol and holster. I identified——

Q. Did any witness testify that he saw Willie Francis commit this crime?

A. No, he was alone when he committed it.

Q. Is it not a fact that the only testimony against Willie Francis in this case was the alleged confession of Willie Francis?

A. Say that again.

Q. Is it not a fact that the only testimony against Willie Francis in this case was the alleged confession of Willie Francis?

A. That was the principal part of the testimony—his admission—in addition to these others facts and circumstances, such as the finding of the pistol. The jury convicted him on the evidence they heard.

Q. Were there any witnesses who testified in behalf of Willie Francis?

A. As I understand it, there were none. I don't remember anyone.

Q. Did not Mrs. V— B—, the lady who lived next door to Andrew Thomas, say she was awakened by the shots and saw the car parked outside with the lights on and when Mr. V— B— awakened he did not see anything?

A. She looked outside and, according to the testimony at the coroner's inquest, saw this car outside with the lights on.

Attorney De Blanc: I don't know if it was this car. She saw a car.

Q. Was she ever brought to testify?

A. No.

Q. What about the gun that was supposed to have shot Andrew Thomas?

A. I am glad you brought that up. I want to tell you about that. The sheriff was working as hard as a man can work to connect this case up. He was trying to gather up the threads of the case. He took that pistol, because of a bullet which had come out at the chest which was not very badly damaged—just a little bit flattened. He wanted to send that bullet and pistol to a ballistic expert to seek to identify the bullet and the pistol. The pistol was delivered to Captain Wright, a state policeman, who took it to Colonel Atkins of Baton Rouge and Colonel Atkins sent it to Washington to Hoover and the pistol was lost in transportation. During the war there was a congestion of traffic, mail, etc. We have never heard from that pistol since. All of these other facts, such as the finding of the holster, were upheld. Willie Francis did not tell us about the holster until he had been in jail four months. He came out with it voluntarily. We did not know anything about the holster until just about a couple of weeks before the trial. The pistol had already been sent off and accounted for in that way. Colonel Atkins testified that he had sent it himself, via express,—had a receipt for it.

Q. The pistol was identified by Fuselier.

A. Yes, sir. He told the sheriff what kind of a pistol and it was a Smith and Wesson.

Attorney De Blanc: How long did the trial last, Mr. Pecot.

A. Two days.

Q. Were there any bills of exception taken during the trial?

A. The judge overruled almost every exception that was made.

Attorney De Blanc: That is all.

APPENDIX 2

Affidavit of official witness to execution of Willie Francis, Willie Olivier

STATE OF LOUISIANA,
Paris of St. Martin:

Before me, the undersigned authority, personally came and appeared Willie Olivier, a resident of the Parish of St. Martin, Louisiana, who after being duly sworn, did depose and say:

My name is Willie Olivier. I was duly appointed by Sheriff E. L. Resweber, to officially witness the electrocution of Willie Francis which was scheduled to take place on the 3rd of May 1946. I was in the St. Martin Parish Jail about the hour of 12 noon on the 3rd of May, 1946. The official electric chair had been installed in the said jail. Around 12 noon Willie Francis, the condemned negro, was brought in the jail. He was strapped to the chair and the officials in charge of the electrocution made everything ready to electrocute him. The priest ministered unto him a[illegible] then the hood was placed before his eyes. Then a few mi[illegible]tes after 12 noon the electrocutioner turned on the switch and at that very moment that the switch was turned on, Willie Francis' lips puffed out and he groaned and jumped so that the chair rocked on the floor. Then the condemned man yelled: "Take it off. Let me breath." The switch was turned off and the condemned man was taken from the chair. During the at-

tempted electrocution I saw present there: Desire Judice, Ignace Doucet, Sidney Dupois, Dr. Bernard de Mahy, the Coroner, Dr. Yongue, Luke Laviolette, and two colored priests.

WILLIE OLIVIER.

Witnesses:
ALFRED VINCENT.
MRS. BERTRAND DE BLANC.

Sworn to and subscribed before me on this 24th day of May, 1946 in the presence of the abovenamed witnesses who also signed with him.

Done at St. Martinville, La.

BERTRAND DE BLANC,
Notary Public,
Parish of St. Martin, State of La.
State of La.

My commission is issued for life.

APPENDIX 3

Affidavit of Father Maurice L. Rousseve relating to execution of Willie Francis

STATE OF LOUISIANA,
Parish of St. Martin:

Before me, the undersigned authority, personally came and appeared Rev. Maurice L. Rousseve, a resident of the Parish of St. Martin; Louisiana, who after being duly sworn, did depose and say:

My name is Rev. Maurice L. Rousseve. I was the Chaplain who officiated at the attempted electrocution of Willie Francis on the 3rd. of May, 1946. I arrived at the St. Martin Parish Jail at about 15 minutes to 12 noon on the 3rd. of May, 1946. I was given immediate access to speak to Willie Francis who had been brought from the Iberia Parish Jail and at that time was in one of the cells of the St. Martin Parish Jail. I remained with him until he was brought and placed on the electric chair which had been

installed in the jail for the execution. Willie Francis was composed and fully resigned to his fate. After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: "Goodby Willie". At that very moment, Willie Francis' lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: "Take it off. Let me breath." Then the switch was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve. Then Willie Francis was handcuffed and taken to his cell and I stayed with him a little while and left.

Among those present at the attempted electrocution, I say: Dr. Yongue, the Coroner, Dr. Bernard de Mahy, Sheriff E. L. Resweber, Chief of Police Claude Thomas, Rev. M. Williams the other Chaplain.

REV. MAURICE ROUSSEVE.

Sworn to and subscribed before me this 25th. day of May, 1946, at St. Martinsville, La.

BERTRAND DE BLANC.
Notary Public.

APPENDIX 4

Affidavit of Ignace Doucet, witness to the execution of Willie Francis

STATE OF LOUISIANA,
Parish of St. Martin:

Before me, the undersigned authority, personally came and appeared Ignace Doucet, a resident of the Parish of St. Martin, who after being duly sworn did depose and say:

My name is Ignace Doucet, a resident of the Parish of St. Martin, Louisiana. I witnessed the attempted electro-

cution of Willie Francis on May 3, 1946. I saw him strapped in the chair and saw them place the hood before his eyes. I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out "Take it off. Let me breath." Then they took the hood from his eyes and unstrapped him.

During the morning of May 3rd. I saw them make ready the chair and the mechanisms. The electrician was working on the mechanisms all morning. I saw him take it all down and put it up again. Then about 11 o'clock A. M. he told me that everything was working perfectly and he quit fooling with it.

Incidentally, after the attempted electrocution, the electrocutioner told Willie Francis that although he did not kill him that time, the next time he would kill him if he had to use an iron bar to do it.

All this is what I saw and heard myself on the 3rd. of May, 1946. This boy really got a shock when they turned that machine on.

IGNACE DOUCET.

Sworn to and subscribed before me, this 30th day of May, 1946.

BERTRAND DE BLANC,
Notary Public in and for the Parish of St. Martin, Louisiana.

APPENDIX 5

Affidavit of Harold Resweber, official witness to execution of Willie Francis

STATE OF LOUISIANA,
Parish of St. Martin:

Before me, the undersigned authority, personally came and appeared Harold Resweber, a resident of the Parish of

St. Martin, Louisiana, who after being duly sworn, did depose and say:

My name is Harold Resweber, I was duly appointed by Sheriff E. L. Resweber, to officially witness the electrocution of Willie Francis which was scheduled to take place on the 3rd. of May, 1946. I was in the St. Martin Parish Jail at the hour of 12 noon on the 3rd. of May, 1946. The official electric chair had been installed in the said jail. Around 12 noon Willie Francis, the condemned negro, was brought in the jail and he was placed in the electric chair. He was strapped to the chair and the officials in charge of the electrocution made everything ready to electrocute him. The priest ministered unto him and then the hood was placed in front of his eyes. Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: "Take it off. Let me breath." Then the switch was turned off and the condemned man was taken from the chair.

During the attempted electrocution I saw present there; Ignace Doucet, Sidney Dupois, Dr. Bernard de Mahy, the Coroner, Dr. Yongue, two Moreau fellows, Willie Olivier, and two colored priests.

HAROLD RESEWEBER.

Sworn to and subscribed before me this 23rd day of May, 1946, at St. Martinville, La.

BERTRAND DE BLANC,
Notary Public, Parish of St. Martin, State of La.

My commission is issued for life.

APPENDIX 6

Affidavit of Sidney Dupois, Official Witness to Execution of Willie Francis

STATE OF LOUISIANA,
Parish of St. Martin:

Before me, the undersigned, personally came and appeared Sidney Dupois, a resident of the Parish of St. Martin, Louisiana, who after being duly sworn did depose and say:

My name is Sidney Dupois. I was duly appointed by Sheriff E. L. Resweber, to officially witness the electrocution of Willie Francis which was scheduled to take place on the 3rd. of May, 1946 between the hours of 12 noon and 3 P. M.

I was in the St. Martin Parish Jail at 12 noon of the 3rd. of May, 1946. The official electric chair had been installed in the said jail. A few minutes after 12 noon Willie Francis, the condemned negro, was brought in and he was placed in the said electric chair. He was strapped to the chair and all necessary preparations were made to electrocute the said Willie Francis. The priest came up to Willie Francis and asked him if he had anything to say and he did not answer. The priest had him to kiss the cross and the band was placed over his eyes. The man in charge of the electrocution asked if everything was all right and then he turned on the switch. At that very moment Willie Francis' lips puffed out and he grunted and made the chair jump. The switch was kept on a little while and then Willie Francis yelled: "Take it off. Let me breath". Then the switch was turned off and the condemned man was unstrapped and taken off the chair and brought into the next room. He was then taken from the jail. Among those I saw there during the attempted electrocution were: Dr. Bernard de Mahy, the Priest, Dr. Yongue, the Coroner, Ignace Doucet, Harold Resweber, a Moreau fellow and his

father, and two other fellows from New Iberia, whose names I do not know. Also I saw Willie Olivier.

SIDNEY J. DUPOIS.

Witnesses:
L. P. BIENVENUE.
MRS. SIDNEY J. DUPOIS.

Sworn to and subscribed before me this 23rd day of May, 1946 at St. Martinville, La.

BERTRAND DE BLANC,
Notary Public, Parrish of St. Martin, State of La.

My commission is issued for life.

(7293)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 142

STATE OF LOUISIANA, EX REL. WILLIE FRANCIS,
Petitioner,

vs.

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

J. SKELLY WRIGHT,
BERTRAND DE BLANC,
ROBERT E. KLEINE, JR.,
JOHN L. INGOLDSBY, JR.,
Counsel for Petitioner.

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REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

ARGUMENT

I

The First Eight Amendments of the Constitution of the United States Are Limitations on the Federal Government and Not on the States. However, Some of the Concepts Contained in Those Eight Amendments Are, under Certain Circumstances, Included in the Due Process Clause of the Fourteenth Amendment.

The brief of the respondent lays great stress on the fact that the first eight amendments are restrictions on the Federal Government and reasons therefrom that the double

jeopardy clause of the Fifth Amendment and the cruel and unusual punishment clause of the Eighth Amendment are not included in the Fourteenth Amendment. It is, of course, axiomatic that the first eight amendments do not apply to the states. The question presented in this appeal, however, has no relation to the first eight amendments. This appeal concerns the Fourteenth Amendment and the question to be determined simply is whether the petitioner is being denied a fundamental right which is protected against state infringement by the due process clause of that amendment; and it is submitted that the historic concepts of double jeopardy and cruel and unusual punishment may be used as a guide by this Court in making that determination just as this Court has on previous occasions used other concepts included in the first eight amendments, such as the right to counsel, freedom of speech and of the press, and freedom of religion, in determining what rights are protected by the due process clause.

Respondent will doubtless admit that if the State of Louisiana or any other state attempted to try a defendant or punish a defendant several times for the same offense, such attempt would amount to a denial of due process under the Fourteenth Amendment. Respondent will likewise doubtless admit that if the State of Louisiana, or any other state, attempted to impose some sort of mediaeval torture on a defendant as punishment for an offense, such attempt would amount to a denial of due process under the Fourteenth Amendment. Certainly this Court would not refuse to protect a defendant under such circumstances. It is obvious, therefore, that the question is simply one of degree and each case must be decided on its own particular facts.

II

The Concept of Double Jeopardy Protects a Person from a Second Punishment for the Same Offense as Well as from a Second Trial. In this Case the Sentence of the Court Has Been Partially Carried Out Through the Punishment Already Administered the Petitioner. A Second Attempt at Execution Would Necessarily Repeat That Part of the Punishment Already Administered.

While it has been generally held that double jeopardy means second trial, this Court has held further that the real purpose of the double jeopardy provision is to protect against a second punishment by the same sovereign for the same offense. In *Ex Parte Lange*, 18 Wallace 163, 21 L. Ed. 872, the petitioner had been sentenced, under a statute which provided as a punishment "imprisonment for not more than one year *or* a fine of not less than $10 nor more than $200", to one year in prison *and* a $200 fine. The fine was paid and five days of the year's imprisonment were served before the court realized it had given an improper sentence. Thereupon the petitioner was called back for resentence, the previous sentence was vacated and the petitioner was then sentenced to one year's imprisonment for his offense. On writ of habeas corpus this Court discharged the petitioner on the theory that to enforce the second sentence after petitioner had been punished under the first one would be to subject him to double jeopardy in violation of the Federal Constitution.

On page 168 the Court stated:

> "If there is anything settled in the jurisprudence of England and America it is that no man may be twice lawfully punished for the same offense."

And on page 175:

"The petitioner, then having paid into court the fine imposed upon him of $200, and that money having passed into the treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

"The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year or a fine not exceeding $200. The court, through inadvertence, imposed both punishments, when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his $200 fine and is imprisoned one year and five days, being all that the first judgment imposed on him, and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court."

* * * * * * *

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield, and forbade that he should be punished again for that offense. The record of the

Court's proceedings, at the moment the second sentence was rendered, showed that in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that very offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, and it was error because the power to render any further judgment did not exist."

* * * * * * *

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

The *Lange* case is authority for the proposition that no man can be punished twice for the same offense even where the court *through inadvertence* imposed an illegal sentence in the first instance. The fact that the defendant was partially punished under the original illegal sentence acted as a bar against further punishment.

It is submitted that in the case presently before this Court the petitioner has already been partially punished under the sentence of the District Court of the Parish of St. Martin. He has undergone the confinement prior to this execution. He has been prepared mentally and physically for his death. He has been seated in the electric chair and his

body was exposed to the electric current. There was no further punishment which the State of Louisiana could administer to Willie Francis except the actual extinction of his life, and, as already stated, no living being knows how close Francis actually came to death. It cannot be seriously denied that the preparation for execution, with its hopes, its fears and its frustrations, is punishment and this court has so held in *Ex Parte Medley*, 134 U. S. 160, 32 L. Ed. 835.

In order to execute the petitioner, it would be necessary to repeat in full all of the punishment he has already undergone in accordance with the sentence of the District Court—the state certainly cannot pick up where it left off—and to the extent that the punishment must be repeated Willie Francis would be subjected to a second punishment for the same offense. If it be admitted that protection against second punishment is part of the historic concept of double jeopardy, and this Court has foreclosed that issue in *Ex Parte Lange, supra,* and if it be admitted further that the preparation for execution is a part of the punishment under a death sentence, and this Court has foreclosed that issue in *Ex Parte Medley, supra,* then under the circumstances of this case a second attempt to execute the petitioner would be double jeopardy under the English jurisprudence as well as the jurisprudence of this Court.

III

A Second Attempt to Execute Willie Francis Would Be a Denial of Equal Protection of the Law Guaranteed to All Persons by the Fourteenth Amendment of the Constitution of the United States.

The District Court of the Parish of St. Martin sentenced Willie Francis to death in the manner provided by law. That court did not, nor could it, sentence Willie

Francis to be tortured with rehearsal runs, unknown to him as such, in the electric chair. No one will deny that if the court had sentenced Francis to the punishment he has already undergone, in addition to the punishment which the State of Louisiana still wants to inflict on him, that such a sentence would be unconstitutional, not only because it directed the administration of cruel and unusual punishment to which he has not been sentenced, but also because it provided for a denial of equal protection of the law. The possibility that the punishment already administered to Francis may be the result of mere negligence or inadvertence on the part of agents of the state rather than design does not change the basic fact that that punishment, coupled with a second attempt at execution, would be cruel and unusual and a definite departure from any death sentence that has ever been administered by the State of Louisiana upon any of her citizens. Certainly such inadvertence or negligence does not, from the standpoint of Francis personally, make the punishment less severe or more palatable. If he had a right to be executed in the customary manner as persons similarly situated have been and are being executed, then he is not deprived of that right by the mistakes of the State, nor do the mistakes of the State of Louisiana justify a denial of equal protection of the laws to this petitioner.

This Court, in *Barbier* v. *Connolly*, 113 U. S. 227, 113 L. Ed. 923, stated that equal protection of the law under the Fourteenth Amendment means that no greater punishment can be inflicted by a state on one than is inflicted on other defendants similarly situated.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was stated further that acts of state agents under a valid law may nevertheless amount to a denial of equal protection of the law.

It is submitted that if the petitioner is subjected to a second attempt at execution he will be subjected to a pun-

ishment greater than the punishment administered to other condemned men by the State of Louisiana and that he will thereby be denied equal protection of the law.

Conclusion

Assuming that the failure of the first attempt to execute Francis was caused by negligence or inadvertence on the part of the State of Louisiana, any further attempt at execution will be a deliberate, purposeful and intentional act on the part of the State of Louisiana. Such deliberate, purposeful and intential act would amount to double jeopardy and cruel and unusual punishment and a denial of equal protection of the law. It is submitted that those historic concepts of double jeopardy and cruel and unusual punishment as they appear in this case are included in the concept of life and liberty protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

J. Skelly Wright,
1025 Connecticut Avenue,
Washington 6, D. C.
Bertrand De Blanc,
227 West Main Street,
Lafayette, Louisiana,
Robert E. Kline, Jr.,
Munsey Building,
Washington, D. C.
John L. Ingoldsby, Jr.,
1025 Connecticut Avenue,
Washington 6, D. C.
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No. 142

STATE OF LOUISIANA, EX REL.
WILLIE FRANCIS,
Petitioner

Versus

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

Writ of certiorari to the Supreme Court of Louisiana.

Brief on Behalf of E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana; Hon. James D. Simon, Judge of the 16th Judicial District Court, Parish of St. Martin, Louisiana; His Excellency, James H. Davis,, Governor of the State of Louisiana; Hon. J. Emile Verret, Lieutenant Governor of the State of Louisiana; Hon. Fred S. LeBlanc, Attorney General of the State of Louisiana; Hon. L. O. Pecot, District Attorney for the 16th Judicial District Court.

IN OPPOSITION TO THE WRIT GRANTED.

M. E. CULLIGAN,
Special Asst. Atty. Gen'l, State of Louisiana.

L. O. PECOT,
District Attorney, 16th Judicial District of Louisiana.
COUNSEL FOR RESPONDENTS

FRED S. LeBLANC,
Attorney General of the State of Louisiana.
IN PROPER PERSONA

L. O. PECOT,
District Attorney, 16th Judicial District of Louisiana.
IN PROPER PERSONA

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SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No. 142

STATE OF LOUISIANA, EX REL. WILLIE FRANCIS,
Petitioner

Versus

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

Writ of certiorari to the Supreme Court of Louisiana. Brief on Behalf of E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana; Hon. James D. Simon, Judge of the 16th Judicial District Court, Parish of St. Martin, Louisiana; His Excellency, James H. Davis,, Governor of the State of Louisiana; Hon. J. Emile Verret, Lieutenant Governor of the State of Louisiana; Hon. Fred S. LeBlanc, Attorney General of the State of Louisiana; Hon. L. O. Pecot, District Attorney for the 16th Judicial District Court.

IN OPPOSITION TO THE WRIT GRANTED.

MAY IT PLEASE THE COURT:

Your respondents, His Excellency, James H. Davis, Governor of the State of Louisiana, and Honorable J. Emile Verret, Lieutenant Governor of the State of Louisiana, herein appearing through their counsel, M. E. Culligan, Special Assistant Attorney General,

Respondent Hon. Fred S. LeBlanc, Attorney General of the State of Louisiana, in proper persona, and your Respondents E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, and Honorable James D. Simon, Judge, 16th Judicial District Court, Parish of St. Martin, Louisiana, herein appearing through their counsel, L. O. Pecot, District Attorney, 16th Judicial District of Louisiana and L. O. Pecot, District Attorney, in proper persona, inform Your Honors:—

LEGAL HISTORY:

Willie Francis, a citizen of Louisiana, was indicted by the Grand Jury of the Parish of St. Martin, State of Louisiana, on September 5, 1945 (Record P. 1) for the murder of Andrew Thomas, also a citizen of the State of Louisiana.

On September 6, 1945, Francis being unable to employ counsel, the Court appointed Honorable James R. Parkerson, Attorney of the Franklin (St. Mary Parish), Louisiana bar and the Honorable Otto J. Mestayer of the New Iberia, Louisiana bar as associate counsel. (Record P. 2).

Both of these attorneys are lawyers of many years experience, thoroughly seasoned practioners of the highest ability and integrity. Francis was then arraigned in the presence of his counsel, James R. Parkerson, a plea of "not guilty" entered, and the case fixed for trial on September 12, 1945.

Trial was commenced on September 12, 1945, Francis being reperesented by Messrs. Parkerson and Mestayer, the State being represented by L. O. Pecot, District Attorney. A jury was duly impanelled and the Jury after hearing all the evidence, arguments by counsel and the law as charged them by Honorable James D. Simon, Judge, did on September 13, 1945 return a verdict of "Guilty as Charged". (Record P. 5).

Francis was then remanded to the Parish Jail to await the sentence of the Court.

On September 14, 1945 the following sentence was imposed: (Record P. 6)

> "Under Article 30 of the Criminal Code of Louisiana, I now sentence you Willie Francis to suffer death in the manner provided by law."

On March 29, 1946, (Record P. 6-7) death warrant was issued by His Excellency, James H. Davis, Governor of the State of Louisiana, in accordance with the law (Article 569, Code of Criminal Procedure), (Appendix P. 49) commanding the Sheriff of the Parish of St. Martin "to cause the execution to be done on the body of said Willie Francis, so convicted and condemned, in all things according to the judgment and sentence of said Court and the law in all such cases made and provided, by electrocution; that is, causing to pass through the body of the said Willie Francis a current of electricity of sufficient intensity to cause death, and the application and continuance of such cur-

rent through the body of said Willie Francis until said Willie Francis is dead * * *"

On the day set in the Governor's death warrant, May 3, 1946, between the hours of 12:00 o'clock noon and 3:00 o'clock p. m., the necessary steps preparatory to the electrocution of Francis were taken.

Through a latent electrical defect, the attempt to electrocute Francis failed, the State contending no current whatsoever reached Francis' body, the relator contending a current of electricity did pass through his body; but in any event, Willie Francis was not put to death. On the same day, Governor Davis granted a reprieve until May 9, 1946, and stayed the execution of his death warrant. (Record Page 8).

(We call Your Honors attention to what is undoubtedly a typographical error in Paragraph 2 of petitioner's application wherein the date of the death warrant is shown May 26th instead of March 29, 1946, as correctly shown in Record Page 6, folio 11.)

On May 7th, Willie Francis, through Attorney Honorable Bertrand deBlanc, filed a petition for a writ of habeas corpus (Record Pages 9-10-11-12) which was denied on the same date.

On May 8th, Willie Francis, through two other attorneys, A. P. Tureaud and Joseph R. Thornton, also filed a petition for a writ of habeas corpus which was denied. (We call Your Honors attention to the fact

that this petition, dated May 8, 1946, is not shown in this Record but which petition is a part of the record before the Louisiana Supreme Court and was considered by that Court under Docket No. 38219 (Record P. 27).

On May 8, 1946, Lieutenant Governor J. Emile Verret, Acting Governor of Louisiana, on that date granted a reprieve and stayed the execution until after June 7, 1946 (folio 27), and recalled and cancelled the death warrant issued by Governor Davis.

On May 9, 1946 (Record P. 9), relator, through Attorney deBlanc, filed a petition for writs of certiorari, mandamus and prohibition, and for a writ of habeas corpus to the Louisana Supreme Court, their Docket No. 38221, and on May 14th (Record P. 17), also filed a supplemental petition. An answer to plaintiff's original petition was filed on May 13, 1946, (Record P. 19-20) by all of your respondents except Honorable James D. Simon, Judge, 16th Judicial District Court, who filed a separate answer thereto (Record P. 25).

A separate petition for writs of certiorari, mandamus and prohibition was filed by relator Francis through Attorneys Tureaud and Thornton, addressed to the Louisiana Supreme Court, filed on the 8th day of May, 1946, under the Docket No. 38219. (We call Your Honors attention to the fact that this petition also is not shown in this Record.)

On May 15, 1946, these two proceedings under the Docket numbers 38219 (Attorneys Tureaud and Thornton's petition) and 38221 (Attorney deBlanc's original and supplemental petition) having been considered, the writs of certiorari, mandamus and prohibition and the writ of habeas corpus applied for were dismissed (Record P. 27) unanimously by the Louisiana Supreme Court.

For Your Honors information, our Louisiana Supreme Court is composed of seven members, and we are giving you below the names and titles of the Justices whose initials are appended to their unanimous opinion.

C. A. O'N.—C. A. O'Niell, Chief Justice.

W. G. R.—Wynne G. Rogers, Senior Justice (now deceased).

J. B. F.—J. B. Fournet, Associate Justice.

A. L. P.—A. L. Ponder, Associate Justice.

J. B. A. (should be J. B. H., typographical error)—J. B. Hamiter, Associate Justice.

F. W. H.—F. W. Hawthorne, Associate Justice.

R. F. K.—R. F. Kennon, Acting Associate Justice.

No rehearing was applied for, and relator on June 10th petitioned Your Honors for the writ of certiorari, which writ Your Honors granted on June 10, 1946, Mr. Justice Jackson taking no part in the consideration or decision of relator's application.

FACTS:

Believing Your Honors should be informed of the details of this heinous crime, we are giving you below a brief resume of this murder.

The defendant, Willie Francis, a citizen of Louisiana, was indicted and convicted for the murder of a Louisiana citizen, Andrew Thomas.

The locale of this crime was the town of St. Martinville, located in the heart of a most picturesque section of Louisiana, known as "The Teche Country", immortalized by Longfellow in his poem, "Evangeline".

The motive for this crime was robbery (in underworld parlance, "a stick-up"), and to perpetrate this robbery, this murder was committed.

Deceased, Andrew Thomas, was the owner and operator of a drug store, located in St. Martinville (St. Martin Parish), Louisiana, in which town he also resided.

Relator, Willie Thomas, also resided in St. Martinville.

On November 8, 1944, Willie Francis laid in wait for three hours behind the garage of Andrew Thomas for him to come to his (Thomas) home from his drug store.

Francis was armed with a pistol and holster he had stolen previously (during September) out of an automobile, all being the property of August Fuselier.

After Andrew Thomas arrived and was closing the door of his garage, Francis shot him five times. One bullet passed through Andrew Thomas' right eye coming out the temple, two more bullets entered his body under the armpit, one bullet entered about the center of the back, and one bullet a little lower down in the back. Francis then took Thomas' wallet containing $4.00 and Thomas' watch.

In August 1945, approximately nine months afterwards, Francis was arrested in Port Arthur, Texas, charged with assaulting and robbing a man there and confessed to the Texas officials his murder of Thomas. When arrested in Texas, he had on his person the very wallet he had taken from Thomas. Francis was immediately returned to Louisiana. He made a voluntary, and complete confession to Louisiana authorities. Francis had sold the watch he had taken from Thomas to a jewelry store in New Iberia, Louisiana, its name being furnished to the St. Martin authorities by Francis, and the case of which watch was recovered at the jewelry store. Francis also showed the St. Martin authorities where he had thrown the pistol after the murder, and it was recovered, and Francis also showed where he had thrown the holster away, in a culvert back of the railroad tracks back of the Thomas' place, in which spot it was recovered.

Francis has never denied his guilt.

ARGUMENT

Petitioner Francis, has never contended in any Louisiana Court that he did not receive a fair and impartial trial by the State of Louisiana.

Petitioner has been represented in Louisiana's courts by able, aggressive, conscientious counsel; namely, Attorneys Parkerson, Mestayer, deBlanc, Tureaud and Thornton.

Petitioner's whole complaint is that as the sentence of death was not executed on May 3rd, the Governor of Louisiana cannot again issue a death warrant ordering the sentence of death executed by the lawful method fixed by the Louisiana law.

It is admitted that the sentence of death remains unexecuted and Francis is in the custody of your respondent, Sheriff E. L. Resweber.

It is apparent from all the writs that relator has filed, Sheriff Resweber is holding Francis under commitment for the crime of murder and under the sentence of death imposed by the Court.

There is no statutory law of Louisiana nor does its Constitution require that its Courts of original or appellate jurisdiction grant a hearing upon an application for a writ of habeas corpus. All facts necessary to grant or deny relator's petition for the writs of habeas corpus were contained in the petitions. It was within the sound discretion of the Louisiana Courts

to deny these petitions. The Sixteenth Judicial District Court, Parish of St. Martin (the trial court), was the court of competent jurisdiction of the offense and of the person of the relator and had the power and legal duty to render the sentence. The petitions for the writs of habeas corpus are mere endeavors to set aside the sentence of death and such collateral attack was properly denied.

Article No. 7, Section No. 2, Constitution of Louisiana (App. P. 42) requires that the appellate court give reasons for declining to exercise supervisory jurisdiction or to grant a writ of habeas corpus. Those reasons are very full and complete. (Record Pages 27 to 31.)

A refusal to grant a writ of habeas corpus upon application is not a deprivation of liberty without due process of law. Laws of a state under which the officers empowered to act upon a petition can judicially determine whether upon the case made out by the petitioner it should be granted, and may refuse if in his judgment, upon the facts prescribed upon a hearing, the result would be that the prisoner would be remanded, are not in violation of this amendment. In re Taylor, (D.C.Minn. 1879) 12 Chicago Leg. N. 17, 23 Fed. Cas. No. 13,774.

Relator's counsel make a most unique attempt to confer jurisdiction upon Your Honors, in Article VIII of their application to this Honorable Court for the writ of certiorari; we quote therefrom:

"* * * has been denied the protection of the due process clause of the Fourteenth Amendment of the Constitution of the United States by the action of the Supreme Court of the State of Louisiana, the Governor of the State of Louisiana, and the Sheriff of the Parish of St. Martin, Louisiana, in that petitioner is being placed in jeopardy of life and liberty a second time for the same offense and that to subject the petitioner a second time to final preparation for his execution itself would be cruel and inhuman punishment in view of the prior unsuccessful effort to execute him in accordance with law on May 3, 1946."

Answering this contention, we respectfully reproduce below the "jeopardy" clause of the Fifth Amendment: (App. P. 36).

"* * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

This clause is clearly a limitation upon the powers of the Federal Government and is not a limitation upon the States.

In the case of United States v. Lanza et al., 260 U.S. 377, 382, 43 S. Ct. 141, 142, 67 (L. ed.) 314, Mr. Chief Justice Taft said:

"* * * The Fifth Amendment, like all the other guarantees in the first eight amendments, appiies only to proceedings by the federal government (Barron v. City of Baltimore, 7 Pet. 243, 8 L. Ed. 672), and the double jeopardy therein forbidden is a second prose-

cution under authority of the federal government after a first trial for the same offense under the same authority. * * *"

The constitutional inhibition is not against double punishment for one offense, but against double jeopardy for the same offense.

Levin et al. vs. U. S., 5 Fed. (2d) 598, writs refused 46 S. Ct. 21, 269 U. S. 562, 70 L. ed. 412.

It was also held in Donato vs. United States, No. 4492, C.C.A. 3rd Circuit, 48 Fed. (2d) 142:

"* * * The constitutional prohibition is not against double punishment, but against being "twice put in jeopardy", double trial. Bens vs. United States, 266 F. 152, 159 (C.C.A. 2); United States vs. One Buick Coach Automobile (D.C.) 34 F. (2d) 318, 321; United States vs. Ball, 163 U. S. 662, 669, 16 S. Ct. 1192, 41 L. ed. 300. * * *"

In the case of People ex rel. Massarsky v. Adams, Warden, (1944) 47 N.Y. S. (2d) 375, it was held:

"* * * Both our National and State Constitutions declare that no person shall be subject to be twice put in jeopardy for the same offense, Amend. 5, U. S. Const.; Art. I, sec. 6, N. Y. State Const.; this is equivalent to saying that no person shall be twice prosecuted for the same crime. * * *"

In the case of Commonwealth v. Azer, (Mass. 1941), 31 N. E. (2nd) 549, it was held:

"* * * Whether there was double jeopardy depends upon our common law and statutes. Our Constitution contains nothing about it, and the Fifth Amendment to the Constitution of the United States has no application to proceedings in State courts. Spies v. Illinois, 123 U. S. 131, 166, 8 S. Ct. 22, 31 L. Ed. 80; Phillips v. McCauley, 9 Cir., 92 F. 2d 790; Commonwealth v. DiStasio, 297 Mass. 347, 353, 8 N. E. 2d 923, 113 A. L. R. 1133. Compare Grosjean v. American Press Co., 297 U. S. 233, 242 et seq., 56 S. Ct. 444, 80 L. Ed. 660. * * *"

In the case of Commonwealth ex rel. Garland v. Ashe, Warden, (Pa. 1942), 26 A. (2d) 190, it was held:

"* * * The relator's petition must be dismissed. The Fifth Amendment to the Federal Constitution which declares that no person shall for the same offense be twice put in jeopardy of life or limb is a restriction only on the power of the Federal Government. Hurtado v. California, 110 U. S. 516, 534, 4 S. Ct. 111, 28 L. Ed. 232. The tenth section of the Pennsylvania Declaration of Rights, P. S. Const., also contains a prohibition against a person being 'twice put in jeopardy of life or limb' and is a restriction on the power of the state government. But the same act 'denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. * * * the double jeopardy therein forbidden (i.e. in the Fifth Amendment) is a second pros-

ecution under authority of the federal government after a first trial for the same offense under the same authority.' United States v. Lanza, 260 U. S. 377, 382, 43 S. Ct. 141, 142, 67 L. Ed. 314. * * *"

In the case of State v. Carte, (Kan. 1943), 143 P. (2d) 774, it was held:

"* * * It is always well to bear in mind the clear distinction between the subjects of sentence and former jeopardy. Judgment of sentence can be pronounced only after a person has been put on trial and after he has been convicted of, or has pleaded guilty to, the offense, or offenses, charged. Section 10 of our Bill of Rights, in so far as pertinent here, provides: 'No person shall be * * * twice *put in jeopardy* for the same offense.' (Emphasis supplied).

It will be observed the protection afforded by this provision is not against the peril of second sentence or punishment but against being put on trial again for the same offense. People v. Allen, 368 Ill. 368, 383, 14 N. E. 2d 397. * * *"

In the case of People v. Tibbits, (Cr. 3713), (Calif. 1943), 140 P. (2d) 726, it was held:

"* * * Appellant's contention that the procedure herein constitutes double jeopardy within the meaning of section 13, Article I of the Constitution of California, providing 'No person shall be twice put in jeopardy for the same offense', cannot be sustained, because the constitutional guaranty relating to once in jeo-

pardy 'has no application to the service of a sentence, but applies only to twice being put upon trial for the same offense.' In re Wilson, 196 Cal. 515, 524, 238 P. 359, 362. * * *"

In the case of Ex parte Wilson, (Cr. 2764), (Cal. 1925) 238 Pa. 358, it was held:

"* * * First, the constitutional guarantee has no application to the service of a sentence, but applies only to twice being put upon trial for the same offense. In re Harron, 191 Cal. 457, 466, 217 P. 728; 7 Cal. Jur. 943. And, second, the effect of this decision is that the incarceration in the state prison was proper. It is true that a misconception of the law has resulted in the execution of the judgment being interrupted, but that is a circumstance which the state board of prison directors may consider. * * *"

Further answering relator's contention, we reproduce Amendment Eight of the United States Constitution: (App. P. 37).

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This amendment does not apply to the States.

Ex p. Watkins (1833) 7 Pet. 573, 8 U.S. (L. ed.) 786.

See also:

Collins vs. Johnston, (1915) 237 U.S. 502, 35 S. Ct. 649, 59 U.S. (L. ed.) 1071

Ughbanks vs. Armstrong, (1908) 208 U.S. 481, 29 S. Ct. 372, 52 U.S. (L. ed.) 582

Ohio vs. Dollison, (1904) 194 U.S. 447, 24 S. Ct. 703, 48 U.S. (L. ed.) 1062

Bolln vs. Nebraska, (1900) 176 U.S. 87, 20 S. Ct. 287, 44 U.S. (L. ed.) 382, affirming (1897) 51 Neb. 581, 71 N.W. 444

Brown vs. New Jersey, (1899) 175 U.S. 174, 20 S. Ct. 77, 44 U.S. (L. ed.) 119

Brown vs. Walker, (1896) 161 U.S. 606, 16 S. Ct. 644, 40 U.S. (L. ed.) 819, affirming (1895) 70 Fed. 46

Monongahela Nav. Co. vs. U.S., (1893) 148 U.S. 324, 13 S. Ct. 622, 37 U.S. (L. ed.) 463

O'Neil vs. Vermont, (1892) 144 U.S. 332, 12 S. Ct. 693, 36 U.S. (L. ed.) 450

McElvaine vs. Brush, (1891) 142 U.S. 158, 12 S. Ct. 156, 35 U.S. (L. ed.) 971

Eilenbecker vs. Plymouth County, (1890) 134 U.S. 34, 10 S. Ct. 424, 33 U.S. (L. ed.) 801

Spies vs. Illinois, (1887) 123 U.S. 131, 166, 8 S. Ct. 21, 22, 31 U.S. (L. ed.) 80

Edwards vs. Elliott, (1874) 21 Wall. 552, 557, 22 U.S. (L. ed.) 487

Fox vs. Ohio, (1847) 5 How. 410, 434, 12 U.S. (L. ed.) 213

Barron vs. Baltimore, (1833) 7 Pet. 243, 247, 8 U.S. (L. ed.) 672

Livingston vs. Moore, (1833) 7 Pet. 551, 8 U.S. (L. ed.) 751

U. S. vs. Rhodes, (1866) 1 Abb. (U.S.) 28, 27 Fed. Cas. No. 16,151

U. S. vs. Hall, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282

It is incontrovertible that the State of Louisiana Statute, Articles 569-570 (App. R. 49-50) of the Code of Criminal Procedure, providing for the infliction of the death penalty by the application of electricity is not such a cruel and unusual punishment as to abridge the privileges and immunities of citizens.

In re: Kemmler (N.Y. 1890) 10 S. Ct. 930, 136 U.S. 449, 34 L. ed. 519.

That death by electrocution is not a cruel or inhuman mode of punishment has been held in:

Hart vs. Commonwealth, 109 S. E. 582, 587, 131 Virginia 726;

People vs. Durston, 24 N.E. 6, 7, 119 New York 569;

State vs. Tomassi, 69 A. 214, 217, 75 N. J. L. 739, and our Louisiana Supreme Court has held that death by electrocution is more humane and less painful than death by hanging.

State ex rel. Pierre vs. Jones, 200 La. 809, 9 So. (2d) 42.

Your Honors put your seal of approval upon this decision by our Louisiana Supreme Court as you denied writs taken—63 S. Ct. 64, 87 L. ed. Page.....

We repeat, *this amendment does not apply to the States*, and is only a limitation on the United States.

As to the effect of the Fourteenth Amendment "due process" clause, United States Constitution, App. P. 38 we respectfully urge that before Your Honors are justified in stating that there has been a failure of due legal process, this relator must show you he has been deprived of some fundamental right, especially where the Louisiana Supreme Court has acted in accordance with the Constitution and Statutes of the State of Louisiana. No statute of the State of Louisiana has been attacked by relator. No Constitutional provision of the State of Louisiana has been attacked by relator.

In the case of Allen vs. Georgia (1897) 166 U.S. 138, 17 S. Ct. 525, 41 U. S. (L. ed.) 949, it was held:

"* * * To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty, or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying

that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.* * *"

And in this case it was also held:

"* * * Indeed, it is admitted that it would be useless to ask the supreme court of the state of Georgia to reinstate this case, or to grant to the plaintiff in error any relief whatever, because under the rules and decisions of that court, and under the statutes of the state of Georgia, as construed by that court, such relief would be denied. Whether the court should give the plaintiff 60 days, or until the last day of the term, to appear and surrender himself to custody, was a matter for the court to determine; and, even if there were error in that particular, it would not constitute a denial of due process of law. * * *"

In Frank vs. Mangum, (1915) 237 U.S. 309, 35 S. Ct. 582, 59 U.S. (L. ed.) 969, it was held:

"* * * As to the "due process of law" that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a

hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. * * *"

The death sentence imposed in this case does not violate the provisions of the Fourteenth Amendment, either as to due process of law or as to the equal protection of the law, as the State has the right to establish appropriate penalties for the commission of crime.

In Collins vs. Johnston, (1915) 237 U.S. 502, 35 S. Ct. 649, 59 U.S. (L. ed.) 1071, Your Honors said:

"* * * To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the law-making power, are functions peculiarly belonging to the several states; and there is nothing to support the contention that the sentence imposed in this case violates the provisions of the 14th Amendment either in depriving appellant of his liberty without due process of law, or in denying to him the equal protection of the laws. Re Kemmler, 136 U.S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Coffey vs. Harlan County, 204 U.S. 659, 662, 51 L. ed. 666, 668, 27 Sup. Ct. Rep. 305. * * *"

Your Honors have also held:

"* * * The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as

has been often pointed out, this is a limitation upon the Federal government, not upon the states. Barron vs. Baltimore, 7 Pet. 243, 247, 8 L. ed. 672, 674; Pervear vs. Massachusetts, 5 Wall. 475, 480, 18 L. ed. 608, 609; McElvaine vs. Brush, 142 U.S. 155, 158, 35 L. ed. 971, 973, 12 Sup. Ct. Rep. 156; O'neil vs. Vermont, 144 U.S. 323, 332, 36 L. ed. 450, 456, 12 Sup. Ct. Rep. 693; Ensign vs. Pennsylvania, 227 U.S. 592, 597 L. ed. 658, 661, 33 Sup. Ct. Rep. 321. * * *"

Again in West vs. Louisiana (1904) 194 U.S. 263, 24 S. Ct. 650, 48 U.S. (L. ed.) 965, it was held:

"* * * We are bound by the construction which the state court gives to its own Constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein. Among many of the cases to that effect, see *Brown vs. New Jersey*, 175 U.S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77. * * *"

Your Honors have held that a State cannot be deemed guilty of a violation of its obligations under the Constitution because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. It must be accepted as a correct exposition of the law of the State, Common, Statutory, and Constitutional, and the only inquiry can be, does the State law, as applied, afford due process?

Petitioner's counsel in the petition, addressed to Your Honors, for the issuance of the writ of certio-

rari) in Article No. 9 thereof, admit that they realize that the jeopardy clause of the Fifth Amendment of the United States Constitution has a mere procedural aspect. Your Honors, since 1833 to date, have uniformly held that the interpretation of the jeopardy clause dates back to the English Common law and was included in the Magna Charta in 1215, but despite this jurisprudence and the known significance of the term "jeopardy" for a period of practically eight hundred years, counsel are endeavoring to have you write into the Constitution that it was the intention of the framers of that document, (which was directly based upon the Magna Charta, when same was inserted in the Fifth Amendment,) that it had a literal meaning rather than a legal signification. We hardly believe Your Honors could give any serious consideration to this suggestion of relator's counsel even if the Fifth Amendment "jeopardy clause" did apply to the States, which Your Honors know it does not.

In Article No. 9 of the petition an incomplete statement of law is made, that while the Fifth Amendment of the United States Constitution does not directly apply to the States themselves, it does apply through the extension and interpretation of the due process clause of the Fourteenth Amendment, but counsel fails to state that there is no case wherein Your Honors have held that the jeopardy clause of the Fifth Amendment has been so extended, or can have State application. On the contrary, Your Honors have held that rights claimed under the first eight amendments,

adopted as restrictions of the powers of the national government are not protected by this clause.

O'Neill vs. Vermont, (Vt. 1892) 12 S. Ct. 693, 144 U.S. 323, 36 L. ed. 450.

It is, of course, true that there are opinions of this honorable court wherein the "due process of law" clause of the Fifth Amendment has been extended to apply to the States through the Fourteenth Amendment, by the clause of the Fourteenth Amendment, which guarantees to all citizens "due process of law" or "equal protection of the laws."

Under the due process of law clause of either the Fifth Amendment or the Fourteenth Amendment, we submit that law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the Constitutional requisite is satisfied. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of Government unrestrained by the established principles of private right and distributive justice. Caldwell vs. Texas, (Tex. 1891) 11 S. Ct. 224, 137 U.S. 697, 34 L. ed. 816. See also, Duncan vs. Missouri, (Mo. 1894) 14 S. Ct. 570, 152 U. S. 382, 38 L. ed. 485; Giozza vs. Tiernan, (Tex. 1893) 13 S. Ct. 721, 148 U.S. 662, 37 L. ed. 599; Leeper vs. Texas, (Tex. 1891) 11 S. Ct. 577, 139 U.S. 467, 35 L. ed. 225.

We also submit that the power of the Federal Court over State law is only to determine whether it is in conflict with the Constitution and laws of the United States, and that process in the States is regulated by the law of the State. See Walker vs. Sauvinet, (1875) 92 U.S. 92, 23 U.S. (L. ed.) 678.

In re Converse, (1891) 137 U.S. 624, 11 S. Ct. 191, 34 U.S. (L. ed.) 796. See also, Howard vs. Kentucky, (1906) 200 U.S. 164, 26 S. Ct. 189, 50 U.S. (L. ed.) 421.

We have previously covered all the law points involved as the basis of the petition for the writ of certiorari granted herein.

It is our understanding that only the questions specifically brought forward by the petition for writ of certiorari will be considered by Your Honors.

Rule 38, Page 30, U. S. Supreme Court.

We will, therefore, but briefly, discuss petitioner's typewritten brief, categorically, as follows:

(1) Jurisdiction:

Title 28, Section 344 (b), U. S. Code is authority for issuance of the writ of certiorari because it is alleged in the petition that petitioner has been denied protection of the "due process" clause of the Fourteenth Amendment.

(2) Statement of the case:

The legal history of the case from the indictment on September 5, 1945, through the filing

of his petition for writ of certiorari is exhaustively covered in this brief, supra, pages 2 to 6.

The physical facts concerning this murder which was committed on November 8, 1944, (Record P. 1) which was approximately ten (10) months before his indictment, are set forth in this brief only, supra, pages 7 to 8. Petitioner has never seen fit to acquaint Your Honors, either in his petition for the writ of certiorari or in his brief, with the horrible truth of the crime which he committed.

Counsel states on Page 2:

"* * * the evidence introduced against him consisted primarily of his own alleged confession."

Francis made two written confessions, both free and voluntary; one to officials of the State of Texas, at Port Arthur, Texas, the other to the Louisiana officials.

When arrested at Port Arthur, Texas, Francis had on his person the wallet removed by him from the person of his victim. Francis also took his victim's watch, which he sold in New Iberia, where it was recovered and he was identified by the owner of the jewelry store to whom he sold the watch. Francis stated he had obtained the pistol (and it's holster) by theft from an automobile. The pistol was identified by its owner. The holster was also identified by the owner. The pistol

and the holster were both recovered in Francis' presence at the location pointed out by him.

Francis stated he shot his victim five (5) times and there were five bullet wounds in the body of his unfortunate victim. This evidence of his guilt is overwhelming.

On Page 2 of this petitioner's brief it is also stated:

> "No stenographic record was taken of the trial so apparently no appeal was anticipated."

Is this an attempt to inveigle this Court to assume that Attorneys Parkerson and Mestayer, from the very outset of the trial, were deliberately violating their oath?

We respectfully inform this Honorable Court, that in thousands of criminal cases in Louisiana, no stenographic notes of the testimony of witnesses is taken for the legal reason, and no other, that under the Constitution of Louisiana, Article VII, Section 10, Appendix Pages 43-44-45, there can be no appeal on the facts.

The Jury is the sole judge of the facts. When a point of law is involved, objection is made, and when overruled, a bill of exception is reserved, the facts relating to the law point being incorporated in the bill of exceptions.

The next statement in petitioner's brief is:

> "(For the prosecuting attorney's version of what evidence was introduced at the trial, see Appendix 1)".

Appendix 1 of petitioner's brief contains only the last two and one-half pages of Mr. Pecot's statement before the Louisiana Board of Pardons. We attach hereto his entire statement (Appendix Page 53-101). This entire statement was given to petitioner's counsel, Honorable Bertrand deBlanc, by the Louisiana Board of Pardons, in June 1946.

As to "Specifications of Errors," we submit that the opinion,—the unanimous opinion, of the Honorable Louisiana Supreme Court speaks most eloquently for itself.

As to the "Argument of Counsel" in support of their untenable proposition that a second attempt to electrocute petitioner violates the Fourteenth Amendment:

We have already briefed the effect of both the Fifth and Eighth Amendment in relation to the Fourteenth Amendment, and the Fourteenth Amendment itself.

The Courts of Louisiana have the right to impose a sentence of death upon a conviction for the crime of murder. It is the Governor's mandatory duty to execute the sentence in the manner provided by law—electrocution. The sentence, as well as the petitioner, remains unexecuted.

What inalienable right has any citizen to escape the punishment of death provided by law for his crime? It is a fundamental principle of justice that the State or the United States can take the life of a citizen who murders another citizen.

The State of Louisiana in the year of 1940, adopted electrocution as the most humane method to execute the death penalty.

Francis has not paid the punishment fixed by law for his atrocious crime, and the law should take its course.

The function of the Executive Department of all government is to see that the sentence of the Court is complied with. We know of no law which permits any court to stay the hand of the executive branch of government when executing its full legal duty.

As to the "Argument" on "Point No. 11," your attention is respectfully directed that in his brief is the first time that this petitioner has ever contended that he did not receive a fair and impartial trial.

Your Honors would fruitlessly search the entire record in the Sixteenth Judicial District Court or the Louisiana Supreme Court to find any such prior contention.

On the contrary, as pointed out by the Louisiana Supreme Court (Record Page 29):

> "There is no irregularity shown in any of these proceedings. In fact, the relator does not contend that there was any irregularity in the indictment, trial, conviction or sentence."

Your Honors will find that this statement of the Louisiana Supreme Court is unvarnished truth.

While these questions were never urged in the Louisiana Courts and were not brought forward by the petition for the writ of certiorari and are not before you for consideration, and while we do not desire to unnecessarily burden Your Honors, we hope you will pardon us for feeling constrained to fully advise the Court.

Complaint is made that no attack is made on the indictment. How can a legal indictment be attacked? Counsel in their brief have never contended or shown any illegality therein.

Complaint is made that no motion for a change of venue was filed. How could such a motion have been sustained? There was no evidence, and counsel who wrote the brief have never offered any evidence in any Court on which such a motion could have been sustained. No such evidence ever existed.

Complaint is made that no evidence was introduced in petitioner's behalf. What evidence have these counsel for petitioner presented that could have been introduced? Certainly the duty of an appointed counsel is to see that his client obtains a fair and impartial trial, but if the client has no legal defense, surely the appointed counsel has no legal or moral right to manufacture a defense.

Complaint is made that no motion for a new trial was made. Counsel for petitioner's in their brief have not suggested any grounds upon which such a motion could have been predicated.

Complaint is made that no motion for an appeal was filed. We do not believe that any ethical practitioner of law should present a frivolous appeal which has no foundation in law. Counsel in their brief do not attempt to suggest the legal foundation for such an appeal.

As to the second paragraph of Page 11 of petitioner's brief the sovereign State of Louisiana and its duly elected officials have properly performed their duty.

We have already informed Your Honors the law of Louisiana as to stenographic records.

As to the repetitious statement in this paragraph "Obviously no appeal was contemplated and there was none," we inform Your Honors: The two counsel appointed by the Court on September 6th, seven (7) days in advance of trial were:

(1) James Randlett Parkerson, white, born 1879, a graduate of Tulane University admitted to the bar in the year 1900—a veteran criminal lawyer, whose integrity and ability has never been questioned, his decency without reproach. Mr. Parkerson has practiced law in the three parishes of St. Martin, St. Mary and Iberia, which comprise this Sixteenth Judicial District and before our Louisiana Supreme Court for almost half a century—a keen legal mind, alert and aggressive.

(2) Otto J. Mestayer, white, born in 1893, attended law school at both Tulane and Loyola Universi-

ties and admitted to practice in 1926. Mr. Mestayer, too, is a veteran of our Courts, has practiced law in Orleans Parish and the Parishes aforementioned for the last twenty years. Mr. Mestayer has an unblemished reputation for honesty and decency and is of outstanding legal ability and is so recognized in the legal profession.

Can Your Honors believe that men of this character deliberately sat Francis in the "electric chair," deliberately violated their oath and ravished justice? We think not.

Much stress is laid on Your Honors opinion in the case of Powell vs. Alabama, 287 U. S. 45. Your Honors undoubtedly recall this case as one of the "Scottsboro" cases. In the Powell case, the attorney appointed by the Court was appointed the *morning of trial*:

The same conditions do not exist here. Francis lived at St. Martinville with his family, there was no public clamor or hostility, and his counsel had ample time for preparation and trial. Evidence of Francis' guilt was overwhelming.

None of the present attorneys for relator were present at Francis' trial and, therefore, have no personal knowledge thereof nor have they ever presented any evidence to any Court that Attorneys Parkerson and Mestayer were ignorant, negligent or unfaithful to the trust imposed upon them by Honorable James D. Simon, District Judge. Judge Simon, born in 1897, attended Tulane University, admitted to the bar in 1918, became Judge in 1925. Judge Simon is an honorable

man, an outstanding jurist, and was highly praised by petitioner's attorney, Hon. Bertrand deBlanc in his plea for commutation to life imprisonment before the Louisiana Pardon Board. Surely counsel cannot expect Your Honors to believe that this eminent jurist would also sit idly by, let a citizen go to his death (and as a member of the Louisiana Board of Pardons, refuse him clemency) by reason of any attorney's or attorneys' ignorance, neglect or unfaithfulness to the trust which he imposed.

As to the "Conclusion", on Page 14 of petitioner's brief, a careful search within the limit of our ability has been made and we respectfully submit we cannot find any authority which would permit Your Honors to set petitioner free, the sentence being unexecuted, the punishment of death not having been inflicted.

We also respectfully submit:

We have been unable to find any authority reposed in Your Honors to remand this case to the District Court for re-sentence to a punishment less than death, commutation of sentence not being a power delegated to Your Honors.

The Louisiana Supreme Court has emphatically stated that there were no irregularities in this trial. No evidence or law has been offered to your Honors to contradict the Louisiana Supreme Court, and, we, therefore, respectfully submit there has been absolutely nothing placed before Your Honors for your consideration that justifies a remand for re-trial.

SUMMATION

The unanimous refusal by the Louisiana Supreme Court to grant a writ of habeas corpus or to grant supervisory writs of certiorari, mandamus and prohibition to compel the Sixteenth Judicial District Court to grant a writ of habeas corpus was legally sound for the following reasons:

(1) Petitioner was legally convicted for the crime of murder, having received a fair and impartial trial.

(2) A legal sentence of death was imposed.

(3) The Sixteenth Judicial District Court had jurisdiction of the offense and of the person of the petitioner.

(4) Governor Davis' mandatory death warrant was legally issued as provided by Article 569, (App. Page 49) of the Louisiana Code of Criminal Procedure.

(5) Petitioner is held by legal commitment for the crime of murder and for execution of his sentence to death.

(6) Article 1, Section 12, (App. Page 41,) of the Constitution of Louisiana was not violated as death by electrocution is not a cruel or inhuman punishment.

(7) Amendment 8—Constitution of the United States (App. Page 37) has no application to the States.

(8) Article 1, Section 9 of the Constitution of Louisiana (App. Page 40) was not violated as petitioner has not been put in "jeopardy" for the same offense.

(9) Amendment 5—Jeopardy Clause—of the United States Constitution (App. Page 36) has no application to the States.

(10) Amendment 14—Due Process Clause—of the United States Constitution (App. Page 38) was not violated as the law has been administered by a competent court of justice of the State of Louisiana, its law operating on all citizens alike and not subjecting any citizen to arbitrary exercise of the powers of Government.

(11) Article 1, Section 2 of the Constitution of Louisiana (App. Page 39) was not violated as petitioner has received due process of law.

(12) The Court was without authority to release petitioner from the sheriff's legal custody.

(13) The Court was without authority to pardon relator or to commute his sentence.

(14) The sentence of death is unexecuted, and it is the mandatory duty of the Governor of Louisiana to issue his death warrant in accordance with existing law.

We respectfully submit that the Honorable, the Supreme Court of the United States, should not set aside the sentence of death which is unexecuted, nor can this Honorable Court commute such sentence.

We, therefore, respectfully urge that this Honorable Court dismiss the writ of certiorari heretofore granted and recall its stay order, thereby permitting the State of Louisiana, through its Governor, to proceed with the orderly enforcement of its law.

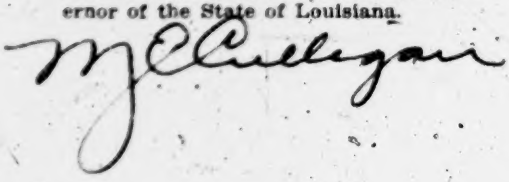
Respectfully submitted,

FRED S. LeBLANC,
Attorney General of the State of Louisiana, in proper persona.

L. O. PECOT,
District Attorney, Sixteenth Judicial District of State of Louisiana, in proper persona.

L. O. PECOT,
Attorney for Respondent E. L. Resweber, Sheriff, Parish of St. Martin, Louisiana, and Respondent, Honorable James D. Simon, Judge, Sixteenth Judicial District Court, Parish of St. Martin, Louisiana.

M. E. CULLIGAN,
Special Assistant Attorney General, Attorney for Respondent Hon. J. Emile Verret, Lt. Governor of the State of Louisiana, and Respondent His Excellency James H. Davis, Governor of the State of Louisiana.



APPENDIX

Constitution of the United States—Amendment #5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. * * *

Constitution of the United States—Amendment #8.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States—Amendment #14 —Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Louisiana (1921)—Article I—Section 2.

No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid.

Constitution of Louisiana (1921)—Article I—Section 9.

In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury; provided, that cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court without a jury or by a jury less than twelve in number as provided elsewhere in this Constitution; provided further, that all trials shall take place in the parish in which the offense was committed, unless the venue be changed; provided further, that the Legislature may provide for the venue and prosecution of offenses committed within one hundred feet of the boundary line of a parish. The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor. Prosecution shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, except in cases arising in the militia when in actual service in time of war or public danger; *nor shall any person be twice put in jeopardy of life or liberty for the same offense*, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained. (Underscoring Ours)

Constitution of Louisiana (1921)—Article I—Section 12.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. All persons shall be bailable by sufficient sureties, except the following: First, persons charged with capital offense where the proof is evident or the presumption great; second, persons convicted of felonies, provided that where a minimum sentence of less than three years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment.

Constitution of Louisiana (1921)—Article VII—Section 2.

The Supreme Court, the Court of Appeal, and each of the judges thereof, subject to review by the court of which he is a member, and each district judge throughout the State including judges of the Civil and Criminal District Courts in the Parish of Orleans, may issue writs of habeas corpus, in behalf of any person in actual custody in cases within their respective jurisdictions; and may also in aid of their respective jurisdictions, original, appellate, or supervisory, issue writs of mandamus, certiorari, prohibition, quo warranto, and all other needful writs, orders and process, and where any of said writs are refused, the appellate courts shall indicate the reasons therefor.

Constitution of Louisiana (1921)—Article VII—Section 10.

The Supreme Court shall have control of, and general supervision over all inferior courts and shall have further jurisdiction as follows:

It shall have exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as may be adopted by the court, and in suits for removal of judges of courts of record from office as elsewhere provided in this Constitution. It shall also have original jurisdiction for the determination of questions of fact affecting its own appellate jurisdiction in any case pending before it; and to that end may make such orders and decrees as it may deem proper in the premises.

It shall have appellate jurisdiction in civil suits where the amount in dispute or the fund to be distributed, irrespective of the amount therein claimed, shall exceed two thousand dollars exclusive of interest, except in suits for damages for physical injuries to, or for the death of a person, or for other damages sustained by such person or his heirs or legal representatives, arising out of the same circumstances; nor shall such appellate jurisdiction extend to any suit for compensation under any State or Federal Workmen's compensation law, or employer's liability act; provided, that appeals properly granted to the Supreme

Court, in such excepted cases, prior to the adoption of this Constitution, shall be finally disposed of by said court.

It shall have appellate jurisdiction of all suits for divorce or separation from bed and board, and of all matters arising therein; of suits involving alimony, of suits for the nullity of marriage, for interdiction, or involving the tutorship of minors, or curatorship of interdicts, or the legitimacy, or custody of children, and of matters of adoption and emancipation.

It shall have appellate jurisdiction in all cases wherein the constitutionality or legality of any tax, local improvement assessment, toll or impost levied by the State, or by any parish, municipality, board, or subdivision of the State is contested, or where the legality, or constitutionality of any fine, forfeiture, or penalty imposed by a parish, municipal corporation, board or subdivision of the State shall be in contest, whatever may be the amount thereof, and in all cases wherein an ordinance of a parish, municipal corporation, board, or subdivision of the State, or a law of this State has been declared unconstitutional. Its appellate jurisdiction shall also extend to all cases involving homestead exemptions irrespective of the amount involved, and the appeal on the law and the facts shall be directly from the court in which the case originated to the Supreme Court; except that in cases involving only movable property, the appeal shall lie

to the court having jurisdiction of the amount or the value of the property involved.

In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts.

The appellate jurisdiction of the Supreme Court shall also extend to criminal cases on questions of law alone, whenever the penalty of death, or imprisonment at hard labor may be imposed; or where a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed.

Louisiana Criminal Code—Act 43 of 1942—Article 30.

Murder is the killing of a human being,

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, burglary in the nighttime, burglary in the daytime, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of murder shall be punished by death.

Louisiana Code of Criminal Procedure—Act 2 of 1928—Article 567.

No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the sheriff of the court wherein the sentence or judgment was passed, commanding the sheriff to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant.

Louisiana Code of Criminal Procedure—Act 2 of 1928—Article 568.

The sheriff of the parish in which said execution is to take place, or a duly authorized deputy, or a competent person selected by him, shall execute the criminal in conformity with the death warrant issued in the case. Until the time of his execution the convict shall be kept in solitary confinement at the parish prison, and no one shall be allowed access to him without an order of court, except the officers of the prison, his counsel, his physician, his spiritual adviser, his wife, children, father, mother, brothers and sisters.

Louisiana Code of Criminal Procedure—Act 2 of 1928—Article 569.

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the parish prison of the parish in which the crime was committed for which said person was convicted, or in the parish to which venue has been changed, or when electricity is not available in the parish prison where an execution is to be performed, the sheriff, with the consent of the governor, may change the place of said execution to an adjacent parish, and shall be inflicted within the walls of the parish jail in a room entirely cut off from view of all except those permitted by law to be in said room.

Louisiana Code of Criminal Procedure—Act 2 of 1928—Article 570.

Every execution of the death sentence shall take place in the presence of the sheriff of the parish or one of his duly designated deputies, the coroner of the parish and a physician summoned by the sheriff to be present, the operator of the electric chair, a priest or minister of the gospel if the convict so requested and not less than five nor more than seven other witnesses all citizens of the state of Louisiana; no person under the age of twenty-one. (21) years of age shall be allowed within said execution room.

Louisiana Code of Criminal Procedure—Act 2 of 1928—Article 571.

When the sentence shall have been executed, the sheriff or his deputy performing the execution, shall make a process verbal of said execution immediately thereafter, which proces verbal shall recite the manner and date of said execution and shall be attested by said sheriff, or his deputy, and by all of the witnesses and said proces verbal, when so signed, shall be filed with the clerk of the court in which the sentence shall have been imposed.

UNITED STATES SUPREME COURT RULES

Excerpt from Rule 38, paragraph 2, page 30:

* * * Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition.

Application filed by Willie Francis, represented by Honorable Bertrand de Blanc, Attorney, before the Louisiana Pardon Board, upon which hearing was held May 31, 1946, and application denied June 1, 1946.

PETITION FOR EXECUTIVE CLEMENCY

TO THE HONORABLE, THE BOARD OF PARDONS FOR THE STATE OF LOUISIANA

The petition of WILLIE FRANCIS, a resident of the Parish of St. Martin, with respect shows:

1.

That he attaches hereto and makes a part hereof his prison record as certified to by Sheriff E. L. Resweber of the Parish of St. Martin, and by Sheriff Gilbert Ozenne of the Parish of Iberia, all in accordance with the rules covering applications for executive clemency. Said copies marked and identified as Exhibit "A".

2.

That petitioner urges that the Board of Pardons is the instrument set up by law to handle the type of case hereinafter set forth by your petitioner.

3.

That on September 5, 1945, petitioner was indicted for the crime of murder; that on September 13, 1945 he was convicted of said crime; that on September 14,

1945 he was sentenced to be electrocuted for said crime; all more fully set out under the cause entitled State of Louisiana vs. Willie Francis, No. 2161 of the Criminal Docket of the Parish of St. Martin, Louisiana. A certified copy of which is annexed hereto and made a part hereof as Exhibit "B".

4.

That based upon said above proceedings a mandatory Death Warrant was signed by His Excellency, James H. Davis, Governor of the State of Louisiana on March 26, 1946 calling for the execution by electrocution of your petitioner between the hours of 12 P.M. and 3 P.M. on the 3rd of May, 1946. Said warrant is now in the possession of His Excellency James H. Davis, Governor of the State of Louisiana.

5.

That your petitioner Willie Francis in accordance with said Death Warrant and on the morning of the 3rd of May, 1946 was brought from the Iberia Parish Prison to the St. Martin Parish Prison. That between the hours of 12 P.M. and 1 P.M. your petitioner was placed in the official electric chair of the State of Louisiana; that he was strapped thereto; that the necessary wires were attached to his body in the regular manner; that after all the necessary steps had been taken the official electrocutioner, an expert, turned on the switch and a current of electricity was caused to pass through the body of your petitioner, all in the presence of the official witnesses.

6.

That your petitioner through an Act of God lived through the electrocution; that petitioner believes that it was the hand of the Lord that stayed his death.

7.

That letters and telegrams received by your petitioner attest that men and women throughout the United States also believe that the failure of the electric chair to kill him was an Act of God, and these good men and women who wrote and telegraphed him also hope that he would not be electrocuted again

8.

That in the several cases in which the hanging of a convicted person resulted in failure, the person was either pardoned or the sentence commuted to life imprisonment.

9.

That men and women throughout the Country have sent in telegrams and phone calls to the Governor of the State of Louisiana urging him not to electrocute your petitioner again.

10.

That petitioner was only 15 years of age at the time the crime was committed.

11.

That by Act of the Legislature of Louisiana, capital punishment was changed from hanging to electrocution. That the reason for which the method of execution was changed was to provide a more humane, quick, and sure method of electrocution. The Legislature believed or had reason to believe that they were providing a quick, sure and more humane method of execution. But to begin executing a man one week and not finish the job until several weeks later is neither sure, nor quick, nor humane.

12.

That another electrocution might be just another practice shot; that this should not be the policy of the State of Louisiana.

13.

That petitioner knows of no case either in this State or in any other where a person has ever gone to the electric chair twice for the same offense.

14.

That it would be barbaric, cruel, inhuman and un-Christian to electrocute him again; that it would be contrary to our ideals of decency.

15.

Petitioner is not urging that he be set free. He only asks that his sentence be commuted to life imprison-

ment. That in view of the fact that he has been electrocuted and has suffered the torture of death and has stood on its threshold without crossing it, he should not have to go through it again. Petitioner knows that life in the penitentiary is not a pleasant thing but he would rather go there than back to the electric chair. Petitioner knows what it is to be bound hands and feet to a chair, to have a mask placed on his face, to be told goodbye, to have the electric current turned on, to be on the doorsteps of death.

16.

That the legal question of whether or not your petitioner can again be placed on the electric chair and executed is a moot one. The Courts have not decided that question; That the Acts of the Legislature are silent on the subject; that therefore the question rests in Equity. Who is in a better position to decide what is equitable than the Board of Pardons to whom the power has been granted by the Legislature to recommend a commutation in cases which deserve it. You the Board of Pardons are in a position of paramount importance today: People everywhere are wondering here in America, if it is possible to begin electrocuting a man one week and finish with him a few weeks later. Our enemies in the late war have used that method of prolonging agony. Yes, people are wondering everywhere whether justice and equity will be done in the State of Louisiana. And you are in the enviable position of one who can say to the rest of our sister States:

"Yes, Justice and Equity are not only the brilliant stars they always were in this State but they will shine more luminous than ever because we are recommending that this negro's sentence be commuted from death to life imprisonment. He shall not have to sit in the electric chair again. The voice of no man shall rise from the grave to mock justice in this State nor shall the blood of any man stain her fair name."

WHEREFORE, petitioner prays that, all the above facts considered, he be granted executive clemency and that his sentence be commuted from death to life imprisonment.

(s) Bertrand de Blanc
BERTRAND DE BLANC
Attorney for Petitioner

STATE OF LOUISIANA
PARISH OF IBERIA

BEFORE ME, the undersigned authority personally came and appeared WILLIE FRANCIS who after being duly sworn did depose and say:

That he has read the foregoing petition, that all the allegations therein contained are true and correct.

(s) Willie Francis
WILLIE FRANCIS

Sworn to and subscribed before me, this 13th day of May, 1945.

(s) S. J. Segura
DTY. CLERK & NOTARY PUBLIC

LOUISIANA PARDON BOARD HEARING, MAY 31, 1946.

Testimony of Dennis D. Bazer, Warden, Louisiana State Penitentiary, Angola, Louisiana.

QUESTION BY THE BOARD:

Q. Mr. Bazer, your name is Dennis J. Bazer and you are Warden of the Louisiana State Penitentiary?

A. Yes, sir.

Q. Do you have any statement to make to the Board on the facts on this application?

A. The only statement I could give is to the operation of this chair and what part I have to play with it—along that line, Judge. Usually I go with the chair myself. On this occasion I did not go—it would have made no difference if I did or did not but I sent Captain Foster in charge. The chair is kept at the penitentiary. Mr. Esnault is our chief electrician and he keeps the chair up and whenever he takes the chair out to the one that is carrying it I sent the electrician along with him. I sent this time Vincent Venezia, who is an inmate, with Captain Foster. The electricutioner, who lives in Shreveport, has nothing to do with that—all he does is apply the switch and the chair is supposed to be checked out when it leaves the penitentiary in good shape and, of course, if something goes wrong with the wiring or anything on the way—of course—I am not enough electrician to explain that. Anyhow, that is how it is handled whether it is proper or im-

proper, I don't know. There has been a whole lot said about this case and a lot of newspapers and letters wrote all over the country so I was over in Houston week before last at the Wardens' Convention and was talking to the Superintendent from Huntsville and he said that he had a similar case to this and I asked him how it happened and he told me the best he could, so when I was summoned by the Pardon Board to come down here to this hearing, I had my secretary call the superintendent over there to give me what information he could on that particular case so I had a letter from him this morning and, if you would like to see it—a short letter here and the facts are in there, and if you would like to see this letter or have me read it, I can do so.

Q. Is it addressed to you?

A. Yes, sir.

BY THE BOARD:

You may read it—I would like to hear it, whatever it is.

A. This is from the Texas Prison System, Huntsville, Texas.

"May 29, 1946.

Hon. D. D. Bazer, Warden, Louisiana State Penitentiary, c/o Attorney General's Office, New Court Bldg., New Orleans, La.

Dear Warden Bazer:

At the request of Mr. Winkle of your institution I am giving you below all of the facts available regarding the delay of the execution of a man in Texas when the motors and generators used in

electrocutions failed to function. This happened in the month of April, 1938. John W. Vaughn was received at the state penitentiary at Huntsville, Texas, on March 8, 1939 from Bexar County, and his execution date was fixed by the court as April 22, 1938. Early on the morning of April 22, 1938 Vaughn was led to the execution chamber and strapped in the electric chair. For some reason the electrical appliances failed to function, and after several trials the warden called the governor, who at that time was the Honorable James V. Allred and advised him of the situation. The governor advised the warden that he was granting the condemned man a stay of execution of seven days, this being confirmed by a telegram the next day, and later by a proclamation issued by the governor. The one week stay of execution fixed the execution date as April 29, 1938. On the date of April 28, 1938, the judge of the District Court of Limestone County, which is the seventy-seventh district court of the State of Texas, a temporary restraining order was issued by the District Judge restraining the prison officials from carrying out the mandate of the court which fixed Vaughn's execution date as of the twenty-ninth of April, 1938. On being advised of this temporary restraining order Governor Allred granted an additional twenty-four hour stay of execution. The matter was then called to the attention of the District Court in Bexar County, which Court had originally sentenced Vaughn to be executed, who immediately dissolved the restraining order issued by the District Court of the seventy-seven judicial district. It was then the opinion of the prison of-

ficials that the matter was all clear so Vaughn was duly executed in the early morning of April 30, 1938.

I am enclosing herewith several sheets which I have removed from a book or pamphlet which we call a compilation and codification of the constitutional provisions and laws of the State of Texas applicable to the Texas Prison System. Since Mr. Winkler advised that your hearing on your Louisiana case was to be held on Friday I am doing this hurriedly and hope that nothing has been overlooked that would be of any help to you.

Trusting that this will reach you in good time and that it will be of some help, I remain,

Very sincerely yours,

(Signed) D. W. Stakes, General Manager
Texas Prison System."

Here is a pamphlet of the laws there—you can file it in evidence. On this occasion, when this execution was to take place, Governor Davis happened to be at my residence, when the officers called me. The sheriff called me that the chair had failed to work. I called it to the attention of the Governor—he said "well, we will just stay this execution" and he started to fix another date and I had another execution at Leesville on that date and I told him to put it off—that I could not make the two on the same day, so he did. That is all I know about this case. I would like to explain—

Q. You don't know just what happened to that electric chair?

A. No, sir. I have an electrician here.

QUESTION BY MR. PECOT:

You have been warden for how long?
A. Six years.

Q. Was that the first time a chair failed to operate.

A. Yes, sir and it has operated since then.

Testimony of Dr. S. D. Yongue, Coroner of St. Martin Parish:

QUESTION BY THE BOARD:

You are the coroner of St. Martin Parish, are you not? Your duties are—

A. S. D. Younge—Coroner of St. Martin Parish.

Q. Doctor, were you present at this date set for the execution of Willie Francis?

A. I was.

Q. Will you tell us what you know about what took place on that date, as far as you are concerned as coroner?

A. As coroner I was watching the procedure of the execution. Willie Francis was strapped in the chair—the appartus placed in position and a blindfold passed over his eyes with a slit in it whereby he could breathe through his nose. I watched him and I saw—it looked like a man throwing a switch over there—it sounded like it. Nothing special happened right away, then I saw the chair move around two or three times; something seemed to go wrong—there was no further movement of the chair. He threw the switch off

and waited a minute and it seemed that he threw it back on again—nothing special happened right away. Directly the chair swinged around a little bit and the blindfold slipped on his face and he says "take this off I cannot breathe" and I heard somebody say "you are not supposed to breathe" and he said "I am not dying" and after that he was removed from the chair—the switch was thrown off. Some officer had him by the arm and they walked out into another room. As Coroner of the Parish I supposed it was my duty to examine him afterwards, which I did and found nothing wrong with him except that his pulse was a little bit fast—I took my stethescope and examined his chest—I listened to his heart beat which was perfectly normal except a little bit accelerated, which could easily have been from apprehension or being excited but I found no serious impairment. I then left.

QUESTION BY BOARD:

Doctor, did you find any marks showing any burns?

A. I did not. I examined his forehead and his chest and I saw his legs. Neither did I smell any odor of burned flesh.

Q. Did he complain of any physical pains about the head or legs?

A. He did not speak to me at all.

Q. May I ask if you noticed, from his demeanor following the attempted execution, anything from which you could gauge any mental or physical reaction?

A. No. When I followed him into the room where they had carried him somebody else was talking to him. I stopped—examined his chest—examined him with my stethescope so as to be able to report to your Excellency what I had discovered but he did not talk to me, neither did I talk to him.

Q. Dr. Yongue, was there another physician present as the law requires, besides yourself?

A. Yes, sir. Dr. Deuilily.

Q. Did he or you make the examination of Willie Francis after the attempted execution, or did you alone?

A. I made the examination alone. I understood that Francis was taken into the other room—I saw him and then I did not see him any more. He did not come into the room while I was there. I am of the opinion that he left immediately and went home, but I stayed to examine him as I considered it my duty.

Q. Was there any evidence of physical pain whatever?

A. I did not discover any.

Q. Did the defendant complain of any pain at the time you examined him?

A. No.

Q. Who took him away—do you know, Doctor. Whose car was he in?

A. There were two or three officers. I don't remember just who they were. It is my opinion that he was still in charge of the Sheriff from New Iberia at the time and also some State policemen. I don't remember just who.

Q. Doctor, had there been any evidence of burns on his head which would permit the application of electrons? As the result of your examination, would you have seen those marks.

A. I watched that when they took the strap off his legs and did not see any. I did not examine the back part of his leg but the front part had no marks. If there had been any marks I probably would have seen them, yes.

BY THE BOARD:

I think that is all, doctor.

Testimony of Captain E. Foster:

QUESTION BY THE BOARD:

What is your name, Captain.

A. E. Foster.

Q. Are you the electrician in charge of the electric chair?

A. I am not an electrician. I go with the chair —I have been going with it for quite a while. I am in charge of it.

Q. Did you go on this occasion? Were you present at the time?

A. Yes.

Q. Will you tell us just what happened.

A. We set the chair up and it worked perfect and when you throwed the main switch on there the needle went back to zero. There was a short-

age—a little wire was loose and the current went back into the ground instead of going into the nigger.

Q. Captain, did you test the machine after it arrived at the courthouse—there in St. Martin Parish.

A. Yes, sir.

Q. You tested it out that morning and you said it worked perfectly?

A. Yes, sir.

Q. The machine was not worked on until the electrocution?

A. No, sir. That wire being loose there causing a shortage had nothing to do with the charging up. It would charge perfectly but when the main switch was thrown in, instead of the current going into the man, it went into the ground.

Q. Are you electrician enough to know whether any electrons went through the body of Francis?

A. None went through the man.

Q. Where did that charge go?

A. It went down to the ground. The shortage caused the charge to go down into the ground instead of into the man.

Q. Captain Foster, the Coroner testified that the defendant moved around in the chair. I want to ask you if the chair is made stationery or fastened to the floor?

A. It is not.

Q. Is it possible for the defendant to move his body in the chair?

A. Yes, sir. He can move the chair with his foot down on the floor.

Q. Were those electrons attached to the body on the head and left leg?

A. On the top of the head and on the left leg.

Q. Did you look at his head afterward?

A. Yes, I did.

Q. Was there any evidence of burns?

A. No, sir.

Q. How about his legs?

A. No, sir.

Q. In other executions, after it was over, was there any evidence of burns on the head or legs?

A. Yes, sir.

Q. Did you see any in this case?

A. No, sir.

Q. There was some evidence or statement that this defendant was tickled in some way or had some sensation as the result of the switch. Were there any electrons which passed through his body?

A. I do not think so—if any had had gone through his body we could tell it. If you had seen as many as I have, you could tell that.

Q. There was a statement that his lips protruded.

A. That could have been caused from that band around his mouth being tight.

Q. Describe that band—just what is the purpose of it?

A. It goes over his mouth and leaves his nose out.

Q. Do you know if it is buckled back to the head to keep it in place?

A. I think so.

Q. The Coroner testified that, after the defendant moved about somewhat in his chair, his head became loose in some way.

A. It could have—I did not notice it.

Q. You were outside?

A. No sir, I was inside signalling to the outside.

Q. Where is the switch, inside or outside.

A. The truck is outside—the switch is inside of the room.

Q. You saw Willie Francis after the switch had been thrown twice?

A. Yes sir—helped unbuckle him from the chair.

Q. Was there any evidence at all that he had received a charge of electricity?

A. No sir.

Q. Was he able to walk at that time?

A. Yes, sir. He got up and walked.

Q. He was talking?

A. He said "take this off my face I can't catch my breath".

Q. Did he ever say anything about suffering physical pain from the application or non-application of electricity?

A. No sir.

BOARD:

That is all.

QUESTION BY BOARD:

Who was the gentleman who went over with the machine?

A. Vincent Venezia.

Q. Did Willie Francis say it tickled him when he got off the chair?

A. I did not hear him say that.

Q. You followed him to the place?

A. No, I just took him out of the chair.

ATTORNEY TUREAUD:

Is it not possible that he received electrons without killing him? Is it not possible that an electron did shock him?

A. I don't think so.

Q. Is it not possible that an electric current would shock him without killing him?

QUESTION BY BOARD:

Is it impossible that electric current did not reach his body?

A. I would say not.

ATTORNEY TUREAUD:

But you would not say sure?

A. No, I would not say sure.

Testimony of Vincent Venezia—Inmate of Angola Penitentiary:

QUESTION BY BOARD:

You work out of Angola?

A. Yes, sir I am an inmate. I am an electrician under Mr. Esnault.

Q. You usually do that?

A. Yes, sir.

Q. How long have you been at that kind of work?

A. Since they used the chair.

Q. Tell what you know about this case.

A. When I got there we unloaded the chair and the switchboard.

Q. What time was that?

A. We started about 8:30 to unload. We put it up in the courthouse where the electrocution come off and I hung it all up and go downstairs and stopped my engine and made my test and set the voltage at 2500 and test my ampmeters—A.C. and D.C.—and see that they all work perfectly. Then I run it for about five or ten minutes and see about my engine and generator and see if it is working good and turn it off. Left it until about ten minutes to twelve.

Q. In other words, you tested the machine that morning and it tested perfectly and then you made no adjustment on the machine?

A. Yes, sir.

Q. You stayed there all the time?

A. No, sir. I stayed with the truck and inspected the wires running from the truck through the window to the switchboard.

Q. The truck is on the ground and you insert wires up through the window into the Parish Jail?

A. Yes, sir.

Q. After you test the machine and from then until the electrocution you remain with the truck —did anyone tamper with it?

A. No, sir.

Q. You did not see anyone tampering with it?

A. No, sir.

Q. Captain Foster referred to signalling to you. Tell us what you know.

A. Well, Captain Foster, after he threw the switch on the machine, signalled to me to give him more gas—that is more power on the engine so he could raise the voltage, to run it up to 2500 volts and I done so but he hollered to me and told me it would not work so I shut the engine down and go upstairs and checked over it and checked it thoroughly and found one of the wires broke loose and I just figured it hit the ground. From the switchboard to the outside to the ground had broke aloose and it all went back to the ground.

Q. Are you prepared to state, as electrician, that no current whatever passed through the body of Willie Francis?

A. Yes, I would say that no current went through the body of Willie Francis—if it had he would not have been able to walk to his cell. Any time electricity hits you you are going to be weak or fainted. You are going to be too weak.

Q. In other words, it produces a certain amount of shock.

A. Yes, sir. I was the one who took the strap off him. I said "how do you feel" so I walked pretty near to the door with him and I asked him "did you get shock at all". He said "no, sir".

Q. Did he claim that the current tickled him?

A. No, sir. I asked him how he felt when I unbuckled him and I asked him "were you hurt" and he said "no, sir". I then took my board down.

Q. Did you take occasion to examine his left leg and head?

A. He was not burned.

Q. In previous executions, were there evidences of burns on the head and leg?

A. If it hits them you can tell it. You can see the rim of the cap which touches him. We put gauze dipped in salt water and shoot the electricity through—it dries it up and when it dries it shows a real burn.

Q. Did you do that in this case?

A. Yes, sir. The gauze was not dry at all either on the leg or head.

BOARD:

That is all.

ATTORNEY TUREAUD:

Do you know positively when that wire got loose—whether it got loose before the switch was turned on or after?

A. I figured that wire got a loose connection and worked off and just when he throwed the main switch it broke loose and hit the ground.

Q. You don't know positively when it broke loose?

A. No, sir. I am not positive.

BOARD:

That is all.

Testimony of U. J. Esnault, Chief Electrician, Angola, Louisiana.

QUESTION BY BOARD:

What is your name?

A. U. J. Esnault.

Q. Are you an electrician?

A. Yes, sir.

Q. Chief Electrician at Angola?

A. Yes, sir.

Q. Did you go on this trip?

A. No, I did not go but we tested the machine at first.

Q. Do you usually go?

A. No, I usually send my assistants.

Q. You keep the electrical end of this chair in good condition? You are the one who is in charge of that?

A. We generally test them with a load to see if the load goes.

Q. That was the day before?

A. A couple of days.

Q. Did you check the machine at that time?

A. Yes, sir. It was O.K. then.

Q. Do you know if the machine worked after?

A. He (Venezia) found the wire broken and put it back himself.

Q. It was back in working condition when it came back to you? Was that machine used the following day?

A. Yes, sir. At Leesville.

Q. Did it work satisfactorily.

A. Yes, sir.

Q. Was that the first time the chair failed to work?

A. Yes, sir.

BY THE BOARD:

That is all, sir, thank you.

Testimony of Mr. E. L. Resweber, Sheriff, St. Martin Parish.

QUESTION BY THE BOARD:

Sheriff, were you there during the whole procedure?

A. Yes.

Q. Will you tell us, in your own words, just what happened.

A. Well, Willie Francis was strapped on the chair and the switch was put on. He squirmed around a little bit and rocked the chair and asked to "take it off" and, in a minute or two interval, "take it off" and said "I cannot breathe" and by that time the executioner asked Captain Foster to get in touch with the Warden. That was between twelve and one o'clock—just after 12—so I went along with Captain Foster and we used the telephone in my office and got in touch with Bazer and he, in turn, connected us with Governor Davis. We told the Governor about our trouble and he ordered me to stay the execution until the following Friday. Then later, of course, he figured we had another execution going on on the following Friday and set the date for the following Thursday instead and further granted him a 29 day reprieve—Governor Verret granted him a 29 day reprieve. I was not present when the man was taken off the chair but I saw him going out in the custody of Sheriff Ozenne and some of his deputies and Captain Wright, with the State Police, and then went on into New Iberia where he has been

kept in custody for safekeeping and he was walking apparently alright, however, I did not examine him.

Q. You know the defendant, Willie Francis, fairly well, don't you?

A. Very well.

Q. Did you have any conversation with him after the attempted electrocution.

A. Except on his way out—I asked him what happened.

Q. What did he say?

A. He said "the Lord was with me that time".

Q. Did he complain of any pain?

A. No, he did not.

Q. Was he walking alright?

A. Apparently alright.

Q. Sheriff, are you familiar with the arrest of Willie Francis and the incidents thereafter which occurred in connection with any confession he may have made to any official?

A. You mean in Texas, Judge.

Q. In Texas and Louisiana.

A. He admitted assaulting and robbing a white man in Port Arthur, Texas.

Q. Is there an outstanding warrant for him?

A. I have a warrant right now to hold him in case he should be let free.

Q. What was the date of that alleged crime—was it subsequent or prior to the alleged killing of Andrew Thomas.

A. Several months after.

Q. Warrant for robbery by assault?

A. He is wanted in Port Arthur now.

Q. Well, did you go get him.

A. Yes, sir.

Q. Did he make a confession to you either on your way back. In Texas, or after you got back to Louisiana.

A. On my way back to Louisiana. Yes, sir.

Q. Did he, in that confession, admit the killing, or murdering, of Thomas?

A. Yes, sir. He showed us where he threw the gun away—where we had already found the gun —showed us where he had thrown the holster away in the culvert back of the railroad tracks back of the Thomas place.

Q. Did he say where he obtained the pistol and holster with which he killed Thomas.

A. He stole that gun from one of my deputy's car.

Q. Did he admit stealing it?

A. Yes, sir.

Q. How many times did he admit shooting Thomas?

A. How many times he shot him? Five times, I think it was.

Q. Did he explain just how he went about shooting Mr. Thomas. Tell us about that.

A. He went to Thomas' home pretty early. Mr. Thomas went home early. He was not long—

Q. You are taking this from his confession?

A. Yes. He was waiting behind his garage for three hours. When Mr. Thomas came in and was closing the door of his garage he shot him.

Q. Tell how he shot him—was he shot standing?

A. He said standing, yes sir.

Q. Did he say, after he shot Thomas one time, that Mr. Thomas fell to the ground.

A. He did not say—he said he was standing all the time.

Q. Did he tell you that after he shot Thomas he took his wallet and watch?

A. By the way, we recovered that same watch at Rivere Jewelry Store in New Iberia. Willie Francis showed us—took us to the jewelry store to the man—the man was not so sure about buying such a watch but he looked up his cash book and found where he had made a purchase of $5.00.

Q. How long was that?

A. That was soon after we brought him from Texas. That was about eight months after. Mr. Rivere did not remember him at all but Willie Francis said "I sold you that watch for $5.00" and several days after Mr. Rivere found the watch case that had initials on the back. We could not have made a mistake as to the identify of that watch.

Q. Was there any movement in the watch?

A. They had removed the movement and Mr. Rivere tells us that the movement was placed in a

new case sold at the time—during the war watches were hard to get.

Q. What we would like to know, sheriff, is, after this defendant made the confession, did you take it at face value or check it,

A. I checked every angle of the confession and it checked out.

Q. Did you take him with you to the place he sold the watch?

A. Yes, sir.

Q. What about the holster?

A. The holster also—the holster, gun and watch.

Q. What about the wallet?

A. They found the wallet on his person in Texas that he admitted taking from Thomas.

Q. Did he ascribe any reason as to why he shot Thomas?

A. He first told us he had had a little trouble with Thomas and then later on he said he had no trouble with Thomas—that Thomas was a fine fellow but that he did not know why he did it.

Q. Has he ever denied his guilt?

A. He never did.

Q. Did he appear as repentful or sorry for his deed after you had him?

A. No, sir.

Q. What was his general attitude?

A. He did not care.

Q. Sheriff, there is some testimony here about a fifteen year old boy. For the benefit of the record, what is the physical makeup of this Willie Francis as far as physical development is concerned?

A. He is fully developed. He is about five feet eight or nine inches tall, weighs about one hundred fifty or one hundred fifty five pounds, is a well built boy.

Q. What would you, not knowing his age, give him from all appearances?

A. About nineteen or twenty—maybe twenty-one.

Q. You conclude that from his physical appearance?

A. Yes, sir.

ATTORNEY TUREAUD:

You did not have to use any force to get a statement from him?

A. Everything he told me was voluntary.

Q. Voluntary?

A. He showed no nervousness.

Q. Does he appear to be normal to you?

A. Yes.

Q. You have had quite a number of men in custody. Does he act like a man who is a killer?

A. That is the first killer I have had in my custody. He looks absolutely normal to me, I am not saying that for any reason—I have nothing against the boy.

QUESTION BY BOARD:

Did he tell you about the robbery in Texas?

A. Yes, I did not question him about that. They have a written confession.

Q. Did he admit to you the details of that affair in Texas?

A. No, sir. Not in detail.

Q. Do you know what kind of instrument he used?

A. The officials there told me—he did not tell me.

Q. Was the man there badly hurt?

A. He was unconscious for a few days.

Q. You say in physical development he was about 19 years old. Would you say physically and mentally.

A. Mentally, I don't know. I would say yes.

Q. You do not know if he is physically and mentally developed as a boy of 19?

A. Yes, sir—in every way—mentally and otherwise, yes sir.

ATTORNEY TUREAUD:

Mentally and physically 19.

A. According to my observation, yes sir.

Q. You did not know he was 15—you were surprised when you heard he was 15 years old?

A. I was surprised—I went so far as to get a baptismal certificate on him.

MR. PECOT:

Sheriff, does he read and write?

A. He does read and write.

Q. Is not it a fact that, after Andrew Thomas was murdered, the whole town was astir over this happening. Was not there a great many rumors flying fast and thick, day and night, which you were trying to run down—you and the State Police.

A. Yes, sir. It kept us busy for eight months, night and day.

Q. Is it not a fact that that boy, who had killed and murdered Thomas on November 8th, 1944, remained in the town of St. Martinville, passing in front of your home, while working for Bullot.

A. Yes, sir.

Q. Is it not a further fact that he only left to go to Texas about the month of February or the early part of March, 1945, when matters had sort of calmed down and you were still working on the case?

A. I would not be able to tell you the exact time he left but I know it was a few months after the murder was committed.

SHERIFF PECOT:

That is all.

QUESTION BY THE BOARD:

Was there any other statement made by Willie Francis implicating any other person when he was in your custody?

A. I believe he was in Iberia Parish jail when he made that statement.

Q. Was that statement made to you.

A. Yes, sir. He gave me names of two colored boys and told me where they lived—who they were and where I would find them. I run that down and he gave me some fictitious names. There was nobody by those names and after, finally said that he was just fooling that he was the only one committed that murder.

Q. Did his statements possibly involve the well being of someone else, possibly.

A. What was that?

Q. Did any of his statements made to you involve the life or well-being of other people. In other words, did he make any statements to you involving other people?

A. No, not to me. It was said—it was rumored—but so many rumors were going around that 99½% of them were not true. Just rumors. He did not make any such statement to me.

Q. I think that is all, unless there is something else you wish to say.

Testimony of Sheriff Gilbert Ozenne of New Iberia.

QUESTION BY THE BOARD:

You are Sheriff of Iberia Parish?

A. Yes, sir.

Q. What do you know about Willie Francis' case, Sheriff?

A. What I know is that I am keeping him for Sheriff Resweber, in New Iberia and I happened to take him to St. Martinville the day of the electrocution.

Q. You did not have him before that day?
A. Yes, he had been in jail five or six months.

Q. Before that?
A. Yes.

Q. Did you find any difference in his general attitude since the attempted execution?
A. No, sir.

Q. Does he appear repentant and sorry for his deed?
A. He is about the same. He was a little nervous for a day or two after the date of the execution.

Q. Was he in your custody when he was removed from the electric chair to the adjoining room?
A. Yes, sir. I took him in the room myself.

Q. Did he appear shocked?
A. He was just a little nervous and shaky and I asked him how he felt—he said "alright". The doctor examined him.

Q. Did he appear to be sick for a day or two?
A. No. When I took him back and asked him if he wanted to eat he said he was hungry. I asked the jailer to feed him and he had a very good meal.

Q. Was he contacted that afternoon?
A. Yes, sir. I went there at five and saw him at five and seven and he was feeling alright.

Q. When did the press contact him—that night? Was that the picture published in the newspapers around the area of that district?
A. Yes, sir.

Q. Sheriff, did he show any ill effects when you saw him?

A. No, sir. He walked the same way he walked to come.

Q. Did he make any statement on the outside?

A. Yes, sir.

Q. Who did he speak to?

A. I don't know who he spoke to but he cursed a couple of fellows while I was taking him to the car. They talked to him and he cursed them.

Q. You mean these people on the grounds there? They talked to Willie Francis?

A. Yes, sir. You know, passed some remark—said "that is the fellow". He answered them back.

Q. When he answered them back he cursed them?

A. Yes, sir.

Q. Do you know who those people were?

A. No, sir.

Q. Were they officials?

A. No, sir.

Q. Did he complain to you of any physical suffering as an aftermath of the attempted electrocution?

A. No, sir.

Q. Did you see any marks on his head or left leg?

A. No, sir.

Q. Did you see Willie Francis often, Sheriff, how often?

A. Every day.

Q. Did he seem the same every time you saw him.

A. Same thing.

Q. Sheriff, tell us whether or not, in your opinion, this defendant, Willie Francis, appears to be normal—do you think he is normal?

A. The only trouble with him—his speech is very bad. He stutters.

Q. Is not that known with other individuals who are perfectly sane? Aside from the fact that he stutters is there anything else to make you believe that he is mentally weak?

A. No, sir.

Q. Does he receive mail?

A. Plenty. He reads his mail and I give it to him twice a day—he can write and answers his mail. He writes well.

Q. Did he ever indicate to you at any time that perhaps he had not committed this crime?

A. He never denied it to me, no sir.

Q. Did he ever admit it to you?

A. Yes, sir.

Q. Have you ever seen anything in writing from him to indicate that he still maintains that position?

A. Not in writing—no, sir. Do you mean in writing, any kind of writing? He had in print the cell where he is at that he did kill Andrew Thomas.

Q. Written where?

A. In his cell on the wall in print.

Q. Was that before or since the attempted execution?

A. No, sir. It was before.

Q. Do you recall what is written on the wall?

A. Yes, sir. He says "I kill Andrew Thomas and today he is lying in a grave and I am not a killer but I wonder where I am going to be laying and in what kind of grave I don't know".

Q. Is that written on the wall?

A. Yes, sir on the wall.

Q. He has not seemed to change his attitude since?

A. No, sir.

Q. Did he claim to you that, when the switch was thrown, the electrons tickled him?

A. Yes, he said it did tickle him.

Q. You were not present?

A. Yes, sir, I was there.

Q. I think you were the gentleman who escorted him from the chair into the other room?

A. Yes sir.

Q. Did he claim that it hurt him or just tickled him?

A. He said just tickled him.

Q. Did he evidence any weakened condition? Did he walk without the aid or assistance of others?

A. Yes, he did.

Q. Out of the jail?

A. Yes, sir.

Q. When you reached Iberia was he able to walk into the jail or did he ever make any complaint about pain or suffering?

A. No, sir.

Q. How long after the attempted execution was it before you took him to New Iberia?

A. After he was taken out of the chair he was taken into the other room and set on the bed and the doctor examined him and asked him how he felt and he said "alright". From there he stayed a little while and I asked him if he wanted water or anything and told him I was ready to go and he said "alright".

Q. Would you say that was a half-hour or one hour?

A. I say twenty or twenty-five minutes.

ATTORNEY THORNTON:

You have had men in your jail awaiting execution before. Did he act the same way?

A. About the same. They all act the same way. The night before I ask them if they want to eat or drink anything. He said he wanted something good to eat and I got him to best steak I could buy —some ice cream and cake and he had a very good meal the night before—just like the others.

QUESTION BY THE BOARD:

He did not show any signs of being affected by the fact that the day afterwards he was going to be executed?

A. Said it did not worry him—if he had to die he was ready to die.

ATTORNEY TUREAUD:

In your opinion, did he or did he not get a shock?

A. I could not tell that—what would you think?

Q. I would not know but I know he was tickled. You attended the electrocution. At the time of the electrocution did not the chair move around? Was it your opinion or not that he got a shock?

A. It was something that must have made him move.

Q. Long before the trial, did he make any statement that there was someone else in St. Martinville who was connected with this crime? Did he ever make that statement.

A. Not to me, no sir.

Q. Before the trial, now, did he ever make the statement that someone else was connected with this crime?

A. At one time he said that but we checked and could not find it.

QUESTION BY THE BOARD:

After you checked did he say that he gave other names? Were they fictitious names or were they names you located?

A. The Sheriff in St. Martinville said he did not know anyone by those names. We checked the names he gave us and could not find any of the names.

Q. How large is St. Martinville?

A. About 3,600 or 3,800.

Q. Is it possible for someone to live there without the sheriff knowing them. Sheriff, do you happen to know the people of St. Martinville sufficiently well enough that you can run down the name of any individual?

A. Yes, sir. I know everybody by their first name, their nickname and all.

Q. Did you run down names given to you by Willie Francis? Were they fictitious?

A. They were fictitious. He told me whose son they were and I went to ask the mother. She told me her boy's name and it was something else—that he was away at the time. I think in the armed service, if my memory serves me right. I checked that and was satisfied to just forget about it.

Q. Sheriff, is there anything else about the case or attempted electrocution that you would like to tell us about.

A. Not that I remember worthwhile—nothing that I know.

QUESTION BY BOARD:

What has been his attitude as a prisoner since the date of the attempted electrocution?

A. I believe he is in a better humor than before. Speaks better.

ATTORNEY THORNTON:

His conduct is good. Never gives you any trouble?

A. Yes, it is good.

BY THE BOARD:

That is all.

Address of Mr. L. O. Pecot, District Attorney of Iberia, St. Mary and St. Martin Parishes—Made at Close of Hearing.

BOARD:

Does the District Attorney have anything to say?

DISTRICT ATTY. PECOT:

Gentlemen of this Board, I think that probably this Board would be interested in knowing a brief history of this case from the beginning to end, and, if I do say it, I pride myself of a wonderful memory—to remember the facts of my cases. I very seldom make a note in the preparation of cases; I try to commit everything to memory.

When I was called in on this case, shortly after it happened, I went to St. Martin without delay. I found Andrew Thomas at the funeral home and Dr. Yongue was waiting for me to conduct the autopsy.

QUESTION BY BOARD:

Dr. Yongue is the coroner?

A. The coroner who testified before this Board. Dr. Yongue and myself and one of the

brothers of the deceased, Zie Thomas, we were there. I saw a corpse with a bullet hole through the right eye, coming out at the right temple—two more bullet holes under the armpit and two in the back—one about the center of the back and one a little lower down—five bullet holes. This accused, in my presence, not once, but twice, told his story and I may say that we treated him with every possible consideration and courtesy, speaking to him in an ordinary tone of voice and at times questioning him. He told us his story twice at least that I can recall. You want to bear in mind that this thing broke out, not in St. Martin, but in Port Arthur, State of Texas, and it broke out this way.

The Chief of Police and one of his assistants were looking for a man on a certain train, who was supposed to bring in some dope to Port Arthur. They were at the station looking for that man and, at the same time, they had in mind a case which had happened three or four days before of an old white man who had been assaulted in his apartment and robbed and left in an unconscious condition. The person who had committed that crime had not yet been apprehended but that night, when the train came in, they saw a man coming off the train with a suitcase and they followed him and, as they went down the street, the man with the suitcase was walking a little faster all the time; when he recognized officers of the law coming he dropped the suitcase, and, as he dropped the suitcase, they saw a man crouched down under a tree. They figured they had better pick up the man as he might be an

accomplice of the fellow who dropped the suitcase and that happened to be Willie Francis—he was the man crouched down by that tree. They took him to the police station and began to question him. He stammers, but he can speak, and, after a few minutes they found out that he was not from Port Arthur; they continued to question him and found out that he was from the Parish of St. Martin.

The Chief of Police then recalled that two weeks before that time he had been in St. Martin and Sheriff Resweber had given him a complete story of the Thomas case and asked him, in his activities about the city, if he ran across any man from his section to try to apprehend him because so far they had been unable to get the right man. Therefore, after questioning Willie Francis for two or three or five minutes, he came out with a statement that he was the man who had killed Andrew Thomas in St. Martin—he had shot him five times with a pistol and that he had taken his pocket book away from him with $4.00 in it, and his watch. They asked him if he knew how to read and write and he said he could and they asked him if he had any objection to reducing that statement to writing and he did and, when the case was tried before Judge Simon, I identified that writing—I read the confession and the court allowed this statement or confession to go before the jury.

Now I want to say to you members of the Board for Judge Simon—that he exercised every diligence and every possible care and caution in regard to this case, knowing the severity of it. He

appointed counsel to defend the accused and one of the counsel is an old criminal lawyer from our Parish, James R. Parkinson and Mr. Otto Mestayer of Iberia Parish. Those two men did everything they could possible do in the selection of the jury to try the accused and I want to say that not one man on that jury came from St. Martin—they all came from other parishes away from St. Martin, who did not know Andrew Thomas and knew nothing about this case. They came from Arnaudville, from Cecelia and other sections of the Parish. We did not have one man from St. Martin. I had in mind to get the most competent jurors to give this man a fair and impartial trial. Now I want to say that there was not a loophole in that case—not one. The evidence was so tight from the beginning to the end and so connected that there could have been no mistake about him having killed Andrew Thomas. He admitted and confessed all of the surrounding facts and circumstances about which his confession referred to and I am going to refer to two or three.

He stated he had stolen that pistol from Mr. August Fuselier, a very prominent citizen of St. Martin, while his car was on the street one night.

QUESTION BY BOARD:

Was he a Deputy Sheriff?

A. That is the man the sheriff referred to. Mr. Fuselier had even notified the Sheriff's office of the pistol being stolen in the month of September, while court was going on and before this killing. I remember him coming up and saying his pistol had been stolen.

Willie Francis stated that, after he had shot Andrew Thomas and waited to do so for some two, two and one-half or three hours, by the side of his garage—after shooting him five times and taking his purse and his watch, he went back towards the railroad, away from the public highway on the front, and threw the holster of the gun in a culvert underneath the railroad right-of-way. He described the holster. Mr. Fuselier, without seeing the holster, had described it to the sheriff—the color of it. He even described to him that, due to the length of the pistol, he had to cut the threads of it. Those threads were missing. He gave them the design—a leafy design—on the holster and that holster was found by a town employee who was secured to get underneath that culvert with a hoe and dig out all of the dirt that had accumulated there. That does not lie. That pistol was August Fuselier's. He told the sheriff where he had thrown the gun, after coming back from the railroad where he had first thrown the holster—the spot near the Selon Canal where he had thrown the pistol. A man working for the town found it in a clump of grass where he said he had thrown it after he was arrested.

Gentlemen, it seems to me this case is a question as to whether or not this Board is going to follow the judgment of the jury of twelve men who listened most carefully to the evidence before bringing in their verdict, or whether or not, because of an unfortunate happening due to no fault of anyone, but just a mechanical defect, this Board is going to say "for that reason we are going to extend this man an extra portion of

mercy—we are going to send him to the penitentiary for life instead of making him pay to society for the terrible crime he committed in the Parish of St. Martin".

The other side of the picture is this. I don't say, and hope we are not, going to face other cases of this sort. It is to be presumed that there may be others and you expect juries to do their duty when they are brought face to face with facts in murders such as this. How can we expect them to convict men to pay their debts to society when, afterwards, what they have done is undone by another authority of law having the power to do so. This is what has happened in this case.

There is another side to this case. I don't want to refer to an unpleasant question, but those are facts that do happen. We have repeatedly known, in the past unfortunately, of lynchings going on when often crimes are committed. The only way and safest way to keep that from happening is to bring to justice and punish, according to each case, the guilty party. Society looks to us to do our duty and I know that you gentlemen are not going to be carried away by sentiment in this case and that you are going to carry the law as far as it is possible to do so.

ATTORNEY TUREAUD:

Mr. Pecot, you were the District Attorney who prosecuted Willie Francis in this case?

A. Yes, sir.

Q. Did Willie Francis employ a lawyer?

A. He did not. Judge Simon asked him if he had a lawyer and he appointed attorneys to represent him.

Q. Two attorneys were appointed to represent him because he did not have funds?

A. He did not have sufficient funds at that time.

Q. Do you recall approximately how many witnesses were called to testify against Willie Francis?

A. I don't know but I summoned every possible person connected with this case—connected with the circumstances—I think 12 or 15. Most of them testified as to the confession. There were other facts such as the finding of the pistol and holster. I identified—

Q. Did any witness testify that he saw Willie Francis commit this crime?

A. No, he was alone when he committed it.

Q. Is it not a fact that the only testimony against Willie Francis in this case was the alleged confession of Willie Francis?

A. Say that again.

Q. Is it not a fact that the only testimony against Willie Francis in this case was the alleged confession of Willie Francis?

A. That was the principal part of the testimony—his admission—in addition to these other facts and cir umstances, such as the finding of the pistol. The jury convicted him on the evidence they heard.

Q. Were there any witnesses who testified in behalf of Willie Francis?

A. As I understand it, there were none. I don't remember anyone.

Q. Did not Mrs. V— B—, the lady who lived next door to Andrew Thomas, say she was awakened by the shots and saw the car parked outside with the lights on and when Mr. V— B— awakened he did not see anything?

A. She looked outside and, according to the testimony at the coroner's inquest, saw this car outside with the lights on.

I don't know if it was his car. She saw a car.

ATTORNEY TUREAUD:

Q. Was she ever brought to testify?

A. No.

Q. What about the gun that was supposed to have shot Andrew Thomas?

A. I am glad you brought that up. I want to tell you about that. The sheriff was working as hard as a man can work to connect this case up. He was trying to gather up the threads of the case. He took that pistol, because of a bullet which had come out at the chest which was not very badly damaged—just a little bit flattened. He wanted to send that bullet and pistol to a ballistic expert to seek to identify the bullet and the pistol. The pistol was delivered to Captain Wright, a state policeman, who took it to Colonel Atkins of Baton Rouge and Colonel Atkins sent it to Washington to Hoover and the pistol was lost in transportation. During the war there was a congestion

of traffic, mail, etc. We have never heard from that pistol since. All of these other facts, such as the finding of the holster, were upheld.

Willie Francis did not tell us about the holster until he had been in jail four months. He came out with it voluntarily. We did not know anything about the holster until just about a couple of weeks before the trial. The pistol had already been sent off and accounted for in that way. Colonel Atkins testified that he had sent it himself, via express,—had a receipt for it.

Q. The pistol was identified by Fuselier.

A. Yes, sir. He told the sheriff what kind of a pistol and it was a Smith and Wesson.

ATTORNEY TUREAUD:

How long did the trial last, Mr. Pecot.

A. Two days.

Q. Were there any bills of exception taken during the trial?

A. The judge overruled almost every exception that was made.

ATTORNEY TUREAUD:

That is all.

THE BOARD:

Would anyone else like to say anything? Would you like to close the case?

I hereby certify that the foregoing thirty-five pages of testimony is a transcript of notes taken by me at a hearing before the Board of Pardons on Friday, May 31st, 1946 in the case of Willie Francis,—for commutation of sentence from death to life imprisonment.

(SEAL)

BESSIE LE MAITRE,
Notary Public.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 142

STATE OF LOUISIANA EX REL. WILLIE FRANCIS,
Petitioner,

vs.

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR REHEARING

JAMES SKELLY WRIGHT,
BERTRAND DE BLANC,
ROBERT E. KLINE, JR.,
JOHN L. INGOLDSBY, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 142

STATE OF LOUISIANA EX REL. WILLIE FRANCIS,
Petitioner,

vs.

E. L. RESWEBER, SHERIFF OF THE PARISH OF ST. MARTIN, LOUISIANA, ET AL.,
Respondents

APPLICATION FOR REHEARING

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the State of Louisiana on the relation of Willie Francis, a resident of the Parish of St. Martin, State of Louisiana, represents:

I

On January 13, 1947 this Court affirmed the decision of the Supreme Court of the State of Louisiana in this cause and your petitioner respectfully prays for a rehearing for the following reasons.

II

Your petitioner has been denied a hearing to determine the controverted facts of his case by the courts of Louisiana. Such denial is a denial of the due process required by the 14th Amendment of the Constitution of the United States.

(*Scott* v. *McNeal*, 154 U. S. 34; *Blackmer* v. *U. S.*, 284 U. S. 421; *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103.)

III

This Court, as reflected in both majority and dissenting opinions, has found itself unable to decide this case properly because the facts surrounding the abortive execution have been denied it. Both the District Court of St. Martin and the Supreme Court of the State of Louisiana have refused to give your petitioner a hearing, the District Court simply denying his petition for writ of *habeas corpus* without statement of reasons the same day it was filed and the Supreme Court, in a written opinion based solely on the pleadings, declared that the issue involved in this case is not a "judicial" one and consequently there was no necessity for a determination of the facts (R. 30). Since the majority and dissenting opinions all concede that the issue in this case is judicial or justiciable, a determination of the controverted facts is a prerequisite to adjudication. In lieu of a hearing, this Court, in its opinions, has had to assume certain facts, as will be shown subsequently. Some of these assumptions at least are not only not founded in fact but actually represent the reverse of the true situation.

IV

The majority opinion, at page 3, bases its decision on the following assumption:

> "As nothing has been brought to our attention to suggest the contrary, we must and do assume that the State officials carried out their duties under the death warrant in a *careful* and humane manner." (Italics ours.)

The brief of respondent, beginning at page 59, shows that the operator of the electric chair at the abortive execution

had no knowledge whatever of electricity. The electric chair, with its generators, was sent to the St. Martin Parish Jail by truck from the Louisiana State Penitentiary at Angola. On arrival at the Parish Jail the chair had to be unloaded and placed in a room inside the jail, through the windows of which the wires carrying the electric current were run to the generators on the truck. The only person assigned to assist the operator of the chair in unloading and setting it up was a convict from the state penitentiary who claimed to know something about electricity. If this Court failed to consider these facts because they were not part of the record in this case, these facts can be developed properly through the remand of the case to the Supreme Court of the State of Louisiana. That these facts constitute negligence on the part of the State in carrying out the execution has been recognized by the State of Louisiana herself, for she has changed Article 570 of her Code of Criminal Procedure as a result of this case. Before the abortive execution, Article 570 read as follows:

> "Every execution of the death sentence shall take place in the presence of the sheriff of the Parish or one of his duly designated deputies, the coroner of the Parish and a physician summoned by the sheriff to be present, the operator of the electric chair, a priest or minister of the Gospel if the convict so requested and not less than 5 nor more than 7 other witnesses, all citizens of the State of Louisiana; no person under the age of 21 years of age shall be allowed within said execution room."

By Act 149 of 1946 of the General Assembly of the State of Louisiana, Article 570 was amended and reenacted as follows:

> "Every execution of the death sentence shall take place in the presence of the sheriff of the Parish or one

> of his duly designated deputies, the coroner of the Parish and a physician summoned by the sheriff to be present, the operator of the electric chair, *who shall be a competent electrician who shall not have been previously convicted of a felony,* a priest or minister of the Gospel if the convict so requested and not less than 5 nor more than 7 other witnesses, all citizens of the State of Louisiana; no person under the age of 21 years of age shall be allowed within said execution room."

A study of the change shows that the Legislature of the State of Louisiana believed that the failure of the execution of Willie Francis resulted from the incompetence of the execution officials. In other words, the State of Louisiana has publicly confessed her error and has made provision to eliminate a repetition thereof.

It is respectfully suggested that a hearing before the proper Courts of Louisiana on the facts and circumstances surrounding the abortive execution might reveal some of the considerations which influenced Louisiana in changing her execution law. The record of such a hearing is essential for the proper legal determination of this cause for such a record would show that Louisiana was less than "careful" in the attempted execution of Willie Francis. It would show that the basic assumption on which this Court disposed of this case is not founded in fact.

V

The majority opinion in this case limits its consideration of due process under the Fourteenth Amendment to the Fifth and Eighth Amendments of the Constitution and thereby ignores the broad tests of due process which are outlined in *Holden* v. *Harding*, 169 U. S. 366, 389:

> "Immutable principles of justice which inhere in the very idea of free government."

Hebert v. *Louisiana*, 272 U. S. 312, 316:

> "Fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Palko v. *Connecticut*, 302 U. S. 319, 324:

> "Immunities implicit in the concept of ordered liberty."

and *Snyder* v. *Massachusetts*, 291 U. S. 97, 115:

> "Principle of justice rooted in the traditions and conscience of our people."

In so limiting its decision, this Court has denied petitioner a full consideration of his rights under the due process clause.

VI

The concurring opinion of Mr. Justice Frankfurter recognizes the full and broad concept of due process in the Fourteenth Amendment, but does not and cannot apply those concepts to this case because the facts of this case are not before the Court. Perhaps the facts of this case, if known, would bring it within the "hypothetical situation" described in the concurring opinion. The Courts of the State of Louisiana have refused to give your petitioner a hearing on the facts and circumstances attending the abortive execution; consequently the questions which obviously puzzle all members of the Court in this case cannot be finally and judicially answered. Those questions are:

> Why did the attempt at execution fail?
>
> Was the failure caused by the negligence of the State?
>
> Did the electric current reach your petitioner? If it did, how seriously has he been injured by it, mentally and physically?

An attempt to supply some of these facts, which have been denied this Court by the State of Louisiana, by including affidavits in the Appendix of the briefs of counsel brought only the disapproval of the Chief Justice. These facts are necessary for a legal disposition of this matter because the majority opinions recognize that under certain circumstances a second attempt at execution after an unsuccessful first attempt may be so "repugnant to the conscience of mankind" (*Palko* v. *Connecticut, supra*) as to amount to a denial of due process in the constitutional sense.

VII

In determining what is due process or what actions on the part of the State would be "repugnant to the conscience of mankind", this Court must draw on its learning, its experience and its humanity. A precise definition of what is repugnant to the conscience of mankind will not necessarily be found in the jurisprudence of this Court or any other court. To a limited extent, the test for due process must necessarily be subjective, and where the personal element cannot be removed entirely, no Justice can make of himself an automaton which automatically gives the proper legal decision based on *stare decisis*. The learning, the experience and the humanity of a Justice must necessarily be called upon to define due process by "the gradual process of judicial inclusion and exclusion as cases presented for decision shall require." (*Davidson* v. *New Orleans*, 96 U. S. 97, 104.) No abstract determination can be made concerning the action of a state which may be "repugnant to the conscience of mankind." If the Justices of this Court, with their background of learning, experience and humanity, instinctively feel that a second attempt at the execution of the petitioner is unconscionable and repugnant then such action is "repugnant to the conscience of man-

kind" for they are the sounding boards upon which the conscience of mankind is to be determined under our law.

VIII

In *Ex Parte Medley*, 134 U. S. 160, this Court refused to allow the State of Colorado to execute a man convicted of murder because the State made his confinement prior to execution solitary, with the exception of relatives, whereas the law which was in effect at the time of the offense did not provide for solitary confinement prior to execution. Certainly what Louisiana proposes to do now, without even the sanction of a new law or a new sentence, would increase the punishment after the petitioner's offense infinitely more than Colorado proposed to do. Does the fact that Louisiana has not passed a new law under which your petitioner may be executed make her action less unconstitutional? In the *Medley* case the punishment was only increased in certain respects. In the instant case, it is to be doubled and even the majority opinion recognizes that "our minds rebel against permitting the same sovereign to punish an accused twice for the same offense." All of the petitioner's punishment, both mental and physical, already endured will necessarily be repeated. To that extent the majority opinion itself frowns on the proposed action of the State of Louisiana.

IX

In an effort to justify the proposed action of the State of Louisiana, the majority opinion speaks of the failure of the attempt to execute your petitioner as an "accident", and any punishment your petitioner may have received as a result thereof was unintentionally inflicted. Regardless, that punishment is now a fact and the State of Louisiana has full knowledge of this fact. Her insistence on her

"pound of flesh," which would repeat that punishment, is deliberate, studious and intentional and must be recognized as such.

X

The opinions of the Court indicate that this is a case to be handled by executive clemency. Under Louisiana law there can be no executive clemency unless the Board of Pardons and Reprieves so recommends, and the Board of Pardons and Reprieves has already rejected petitioner's plea for clemency.

WHEREFORE, your petitioner prays that a rehearing be granted in this case, that the mandate be stayed pending the rehearing and that this case be remanded to the Supreme Court of the State of Louisiana for such further proceedings as may not be in conflict with the decision of this Court.

JAMES SKELLY WRIGHT,
1025 Connecticut Avenue,
Washington 6, D. C.;
BERTRAND DE BLANC,
227 West Main Street,
Lafayette, Louisiana;
ROBERT E. KLINE, JR.,
Munsey Building,
Washington, D. C.;
JOHN L. INGOLDSBY, JR.,
1025 Connecticut Avenue,
Washington 6, D. C.,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES
JANUARY TERM 1947

STATE OF LOUISIANA ex rel WILLIE FRANCIS Petitioner	:	
vs.	:	No. 142
E.L. KEswESER, Sheriff of the Parish of St. Martin, Louisiana, et al. Respondents.	:	October Term 1946

SUPPLEMENTAL APPLICATION FOR REHEARING

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the State of Louisiana on the relation of Willie Francis, a resident of the Parish of St. Martin, State of Louisiana, represents:

I

On January 13, 1947 this Court affirmed the decision of the Supreme Court of the State of Louisiana in this cause and your petitioner respectfully prays for a rehearing for the following reasons.

II

The majority opinion on page 3 states:

"Even where a state obtains a new trial after conviction because of errors, while an accused may be placed on trial a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. Palko v. Connecticut, supra 328. As this is a prosecution under state law, so far as double jeopardy is concerned, the Palko case is decisive. For we see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment." (Underscoring ours)

The constitutional vice in the majority opinion is laid bare by this strange analogy. In the Palko case the State of Connecticut was allowed to appeal in a criminal action under a statute so providing. The statute, however, merely allowed the appeal; it did not determine that the state was right without hearing the evidence at a new trial; nor does it authorize the State of Connecticut to appeal successfully from its own error. The majority opinion in the Francis case gives the Governor of the State of Louisiana, and any other State, the right, not only to appeal from his own error but the right to act as prosecution, court and executioner -- all without benefit of hearing to determine the facts. Rather than being decisive against him, it is submitted that the Palko case actually supports the contention of your petitioner in his demand for a hearing on the facts of his case.

WHEREFORE, your petitioner prays that a rehearing be granted in this case, that the mandate be stayed pending the rehearing and that this case be remanded to the Supreme Court of the State of Louisiana for such further proceedings as may not be in conflict with the decision of this Court.

JAMES SKELLY WRIGHT
1025 Connecticut Avenue
Washington 6, D.C.

Attorney for Petitioner

p. 4 of Frankfurter J.

SUPREME COURT OF THE UNITED STATES

No. 142.—October Term, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner, *v.* E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.	On Writ of Certiorari to the Supreme Court of the State of Louisiana.

[January 13, 1947.]

Mr. Justice Reed announced the judgment of the Court in an opinion in which The Chief Justice, Mr. Justice Black and Mr. Justice Jackson join.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued by the Governor of Louisiana, fixing the execution for May 9, 1946.

Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the due process clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and

unusual punishment provision of the Eighth Amendment.[1] These federal constitutional protections, petitioner claimed, would be denied because he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause death. The Supreme Court of Louisiana denied the applications on the ground of a lack of any basis for judicial relief. — La. —. That is, the state court concluded there was no violation of state or national law alleged in the various applications. It spoke of the fact that no "current of sufficient intensity to cause death" passed through petitioner's body. It referred specifically to the fact that the applications of petitioner invoked the provisions of the Louisiana Constitution against cruel and inhuman punishments and putting one in jeopardy of life or liberty twice for the same offense. We granted certiorari on a petition, setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. — U. S. —. For matters of state law, the opinion and order of the Supreme Court of Louisiana are binding on this Court, *Hebert* v. *Louisiana*, 272 U. S. 312, 317. So far as we are aware, this case is without precedent in any court.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Four-

[1] Fifth Amendment: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

teenth Amendment.[2] As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame. We turn to the question as to whether the proposed enforcement of the criminal law of the state is offensive to any constitutional requirements to which reference has been made.

First. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex parte Lange*, 18 Wall. 163, 168, 175; *In re Bradley*, 318 U. S. 50. Compare *United States* v. *Lanza*, 260 U. S. 377, 382. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States v. Ball*, 163 U. S. 662, 672. See *People* v. *Trezza*, 128 N. Y. 529, 535. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed on trial a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. *Palko* v. *Connecticut, supra*, 328.[3] As this is a prosecution under state law, so far as double jeopardy is concerned the *Palko* case is decisive. For we see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the

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[2] See *Twining* v. *New Jersey*, 211 U. S. 78, 99; *Palko* v. *Connecticut*, 302 U. S. 319, 324; *In re Kemmler*, 136 U. S. 436, 445; *Collins* v. *Johnston*, 237 U. S. 502, 510.

[3] See *Kepner* v. *United States*, 195 U. S. 100, 129; cf. *United States* v. *Ball*, 163 U. S. 662, 666–70.

Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution.

Second. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death. See *Weems* v. *United States*, 217 U. S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.[4]

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual

[4] This Court said of a similar clause embodied in the constitution of New York, *In re Kemmler*, 136 U. S. 436, 446:

> ". . . . but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

It added, p. 447:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Louisiana has the same humane provision in its constitution. Louisiana Constitution, Art. 1, § 12. The *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execution.

punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that leve of hardship denounced as denial of due process because of cruelty.

Third. The Supreme Court of Louisiana also rejected petitioner's contention that death inflicted after his prior sufferings would deny him the equal protection of the laws, guaranteed by the Fourteenth Amendment. This suggestion in so far as it differs from the due process argument is based on the idea that execution, after an attempt at execution has failed, would be a more severe punishment than is imposed upon others guilty of a like offense. That is, since others do not go through the strain of preparation for execution a second time or have not experienced a nonlethal current in a prior attempt at execution, as petitioner did, to compel petitioner to submit to execution after these prior experiences denies to him equal protection. Equal protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See *Lisenba* v. *California*, 314 U. S. 219, 226. Laws cannot prevent accidents

nor can a law equally protect all against them. So long as the law applies to all alike, the requirements of equal protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would generally be applied.

Fourth. There is a suggestion in the brief that the original trial itself was so unfair to the petitioner as to justify a reversal of the judgment of conviction and a new trial. Petitioner's claim in his brief is that he was inadequately represented by counsel. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter* v. *People of State of Illinois*, No. 36, October Term, 1946, decided December 9, 1946. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. Nothing is before us upon which a ruling can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 142.—October Term, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner, v. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.	On Writ of Certiorari to the Supreme Court of the State of Louisiana.

[January 13, 1947.]

Mr. Justice Frankfurter, concurring.

When four members of the Court find that a State has denied to a person the due process which the Fourteenth Amendment safeguards, it seems to me important to be explicit regarding the criteria by which the State's duty of obedience to the Constitution must be judged. Particularly is this so when life is at stake.

Until July 28, 1868, when the Fourteenth Amendment was ratified, the Constitution of the United States left the States free to carry out their own notions of criminal justice, except insofar as they were limited by Article I, § 10 of the Constitution which declares: "No State shall . . . pass any Bill of Attainder [or] ex post facto Law . . .". The Fourteenth Amendment placed no specific restraints upon the States in the formulation or the administration of their criminal law. It restricted the freedom of the States generally, so that States thereafter could not "abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or property, without due process of law", or "deny to any person within its jurisdiction the equal protection of the laws".

These are broad, inexplicit clauses of the Constitution, unlike specific provisions of the first eight amendments formulated by the Founders to guard against recurrence of well-defined historic grievances. But broad as these

clauses are, they are not generalities of empty vagueness. They are circumscribed partly by history and partly by the problems of government, large and dynamic though they be, with which they are concerned. The "privileges or immunities of citizens of the United States" concern the dual citizenship under our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the meaning of the struggle for freedom of English-speaking peoples. They run back to Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society. See the classic language of Mr. Justice Matthews in *Hurtado* v. *California*, 110 U. S. 516 530–31.

When, shortly after its adoption, the Fourteenth Amendment came before this Court for construction, it was urged that the "privileges or immunities of citizens of the United States" which were not to be abridged by any State were the privileges and immunities which citizens theretofore enjoyed under the Constitution. If that view had prevailed, the Privileges or Immunities Clause of the Fourteenth Amendment would have placed upon the States the limitations which the specific articles of the first eight amendments had theretofore placed upon the agencies of the national government. After the fullest consideration that view was rejected. The rejection has the authority that comes from contemporaneous knowledge of the purposes of the Fourteenth Amendment. See *Slaughter-House Cases*, 16 Wall. 36, 67–68; *Davidson* v. *New Orleans*, 96 U. S. 97. The notion that the Privileges or Immunities Clause of the Fourteenth Amendment absorbed, as it is called, the provisions of the Bill of Rights that limit the Federal Government has never been given countenance by this Court.

Not until recently was it suggested that the Due Process Clause of the Fourteenth Amendment was merely a compendious reference to the Bill of Rights whereby the

States were now restricted in devising and enforcing their penal code precisely as is the Federal Government by the first eight amendments. On this view, the States would be confined in the enforcement of their criminal codes by those views for safeguarding the rights of the individual which were deemed necessary in the eighteenth century. Some of these safeguards have perduring validity. Some grew out of transient experience or formulated remedies which time might well improve. The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.

These are very broad terms by which to accommodate freedom and authority. As has been suggested from time to time, they may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. That is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court.

In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them. That due process of law has its own independent function has been illustrated in numerous decisions, and has been expounded in the opinions of the Court which have canvassed the matter most thoroughly. See *Hurtado* v. *California, supra; Twining* v. *New Jersey*, 211 U. S. 78; *Snyder* v. *Massachusetts*, 291 U. S. 97; *Palko* v. *Connecticut*, 302 U. S. 319. Insofar as due process under the Fourteenth Amendment requires the States to observe any of the immunities "that are valid as against the federal government by force of the specific pledges of

particular amendments" it does so because they "have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the States." *Palko* v. *Connecticut*, *supra*, at 324–25.

The Federal Bill of Rights requires that prosecutions for federal crimes be initiated by a grand jury and tried by a petty jury; it protects an accused from being a witness against himself. The States are free to consult their own conceptions of policy in dispensing with the grand jury, in modifying or abolishing the petty jury, in withholding the privilege against self-crimination. See *Maxwell* v. *Dow*, 176 U. S. 581; *Twining* v. *New Jersey*, *supra*; *Snyder* v. *Massachusetts*, *supra*; *Palko* v. *Connecticut*, *supra*, at 323, 324. In short, the Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless, as it was put for the Court by Mr. Justice Cardozo, "in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Snyder* v. *Massachusetts*, *supra*, at 105.

A State may offend such a principle of justice by brutal subjection of an individual to successive retrials on a charge on which he has been acquitted. Such conduct by a State might be a denial of due process, but not because the protection against double jeopardy in a federal prosecution against which the Fifth Amendment safeguards limits a State. For the disputations that are engendered by technical aspects of double jeopardy as enshrined in the Fifth Amendment, see the majority and dissenting opinions in *Ex parte Lange*, 18 Wall. 163, and *In re Bradley*, 318 U. S. 50. Again, a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided. But the

cf. Feldman v. United States, 322 U.S. 487.

penological policy of a State is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of "cruel and unusual punishment". See *Weems* v. *United States*, 217 U. S. 349, and particularly the dissenting opinion of White and Holmes, JJ.

Once we are explicit in stating the problem before us in terms defined by an unbroken series of decisions, we cannot escape acknowledging that it involves the application of standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce. When the standards for judicial judgment are not narrower than "immutable principles of justice which inhere in the very idea of free government", *Holden* v. *Harding*, 169 U. S. 366, 389, "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", *Hebert* v. *Louisiana*, 272 U. S. 312, 316, "immunities . . . implicit in the concept of ordered liberty", *Palko* v. *Connecticut*, *supra*, at 324–25, great tolerance toward a State's conduct is demanded of this Court. Such were recently stated to be "the controlling principles". See Mr. Chief Justice Stone in *Malinski* v. *New York*, 324 U. S. 401, 438, in connection with the concurring opinion in that case, *ibid.*, 412, 416, 417.

I cannot bring myself to believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice "rooted in the traditions and conscience of our people". See *Snyder* v. *Massachusetts*, *supra*, at 105. Short of the compulsion of such a principle, this Court must abstain from interference with State action no matter how

strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. One must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation. Strongly drawn as I am to some of the sentiments expressed by my brother BURTON, I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution.

The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions. When the Fourteenth Amendment first came here for application the Court abstained from venturing even a tentative definition of due process. With wise forethought it indicated that what may be found within or without the Due Process Clause must inevitably be left to "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." *Davidson* v. *New Orleans, supra,* at 104. This is another way of saying that these are matters which depend on "differences of degree. The whole law does so as soon as it is civilized." Holmes, J., in *LeRoy Fibre Co.* v. *Chi. Mil. & St. P. Ry.*, 232 U. S. 340, 354. Especially is this so as to questions arising under the Due Process Clause. A finding that in this case the State of Louisiana has not gone beyond its powers is for me not the starting point for abstractly logical extension. Since I cannot say that it would be "repugnant to the conscience of mankind", *Palko* v. *Connecticut, supra,* at 323, for Louisiana to exercise the power on which she here stands, I cannot say that the Constitution withholds it.

SUPREME COURT OF THE UNITED STATES

No. 142.—October Term, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner.
v.
E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.

On Writ of Certiorari to the Supreme Court of the State of Louisiana.

[January 13, 1947.]

Mr. Justice Burton, with whom Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge concur, dissenting.

Under circumstances unique in judicial history, the relator asks this Court to stay his execution on the ground that it will violate the due process of law guaranteed to him by the Constitution of the United States. We believe that the unusual facts before us require that the judgment of the Supreme Court of Louisiana be vacated and that this cause be remanded for further proceedings not inconsistent with this opinion. Those proceedings should include the determination of certain material facts not previously determined, including the extent, if any, to which electric current was applied to the relator during his attempted electrocution on May 3, 1946. Where life is to be taken, there must be no avoidable error of law or uncertainty of fact.

The relator's execution was ordered by the Governor of Louisiana to take place May 3, 1946. Of the proceedings on that day, the Supreme Court of Louisiana has said:

> ". . . between the Hours of 12:00 o'clock noon and 3:00 o'clock p. m., Willie Francis was strapped in the electric chair and an attempt was made to electrocute him, but, because of some defect in the apparatus devised and used for electrocutions, the contrivance failed to function, and after an unsuccessful attempt to electrocute Francis he was removed from the chair."

Of the same proceedings, the State's brief says:

> "Through a latent electrical defect, the attempt to electrocute Francis failed, the State contending no current whatsoever reached Francis' body, the relator contending a current of electricity did pass through his body; but in any event, Willie Francis was not put to death."

On May 8, the death warrant was canceled, and the relator's execution has been stayed pending completion of these proceedings. The Governor proposes to issue another death warrant for the relator's electrocution and the relator now asks this Court to prevent it for the reason that, under the present unique circumstances, his electrocution will be so cruel and unusual as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

That Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." When this was adopted in 1868, there long had been imbedded deeply in the standards of this nation a revulsion against subjecting guilty persons to torture culminating in death. Preconstitutional American history reeked with cruel punishment to such an extent that, in 1791, the Eighth Amendment to the Constitution of the United States expressly imposed upon federal agencies a mandate that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Louisiana and many other states have adopted like constitutional provisions. See Section 12 of Article I of the Constitution of Louisiana (1921).

The capital case before us presents an instance of the violation of constitutional due process that is more clear than would be presented by many lesser punishments prohibited by the Eighth Amendment or its state counterparts. Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man.

It should not be possible under the constitutional procedure of a self-governing people. Abhorence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether. It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days or hours until finally death shall result. The Legislature of Louisiana did not do so. The Supreme Court of Louisiana did not say that it did. The Supreme Court of Louisiana said merely that the pending petitions for relief in this case presented an executive rather than a judicial question and, by that mistake of law, it precluded itself from discussing the constitutional issue before us.

In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. The contrast is that between instantaneous death and death by installments—caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim. Electrocution, when instantaneous, *can* be inflicted by a state in conformity with due process of law. *In re Kemmler*, 136 U. S. 436. The Supreme Court of Louisiana has held that electrocution, in the manner prescribed in its statute, is more humane than hanging. *State ex rel. Pierre* v. *Jones*, 200 La. 807, 9 So. 2d 42, cert. denied, 317 U. S. 633. See also, *Malloy* v. *South Carolina*, 237 U. S. 180.

The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself. Electrocution has been approved only in a form that eliminates suffering.

The Louisiana statute makes this clear. It provides that:

> "Every sentence of death imposed in this State shall be by electrocution; that is, causing to pass

> through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. . . ." La. Code of Criminal Procedure (1928), Act No. 2, Art. 569. as amended by § 1, Act No. 14, 1940.

It does not provide for electrocution by interrupted or repeated applications of electric current at intervals of several days or even minutes. It does not provide for the application of electric current of an intensity less than that sufficient to cause death. It prescribes expressly and solely for the application of a current of sufficient intensity to cause death and for the *continuance* of that application until death results. Prescribing capital punishment, it should be construed strictly. There can be no implied provision for a second, third or multiple application of the current. There is no statutory or judicial precedent upholding a delayed process of electrocution.

These considerations were emphasized in *In re Kemmler, supra*, when an early New York statute authorizing electrocution was attacked as violative of the due process clause of the Fourteenth Amendment because prescribing a cruel and unusual punishment. In upholding that statute, this Court stressed the fact that the electric current was to cause instantaneous death. Like the Louisiana statute before us, that statute called expressly for the continued application of a sufficient electric current to cause death. It was the resulting "instantaneous" and "painless" death that was referred to as "humane."

After quoting the New York County and Supreme Courts, this Court quoted the New York Court of Appeals, at 119 N. Y. 579, as follows:

> "'We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the constitution, though it is certainly unusual. On the contrary, we agree with the court below that it re-

moves every reasonable doubt that the application of electricity to the vital parts of the human body, *under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.*'" (Italics supplied.) *In re Kemmler, supra*, at 443–444.

Finally, speaking for itself, this Court said:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." (Italics supplied.) *Id.* at 447.

If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment? While five applications would be more cruel and unusual than one, the uniqueness of the present case demonstrates that, today, two separated applications are sufficiently "cruel and unusual" to be prohibited. If five attempts would be "cruel and unusual," it would be difficult to draw the line between two, three, four and five. It is not difficult, however, as we here contend, to draw the line between the one continuous application prescribed by statute and any other application of the current.

Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure. The procedure in this case contrasts with

common knowledge of precautions generally taken elsewhere to insure against failure of electrocutions. The high standard of care generally taken evidences the significance properly attached to the unconditional requirement of a single continued application of the current until death results. In remanding this case, we are giving careful recognition to the law of Louisiana. Neither the Legislature nor the Supreme Court of Louisiana has expressed approval of electrocution other than by one continuous application of a lethal current.

Executive clemency provides a common means of avoiding unconstitutional or otherwise questionable executions. When, however, the unconstitutionality of proposed executive procedure is brought before this Court, as in this case, we should apply the constitutional protection. In this case, final recourse is had to the high trusteeship vested in this Court by the people of the United States over the constitutional process by which their own lives may be taken.

In determining whether a case of cruel and unusual punishment constitutes a violation of due process of law, each case must turn upon its particular facts. The record in this case is not limited to an instance where a prisoner was placed in the electric chair and released before being subjected to the electric current. It presents more than a case of mental anguish, however severe such a case might be. The petition to the Supreme Court of Louisiana expressly states that a current of electricity was caused to pass through the body of the relator. This allegation was denied in the answer and no evidence was presented by either side. The Supreme Court of Louisiana thereupon undertook to decide the case on the pleadings. It said:

> "Our conclusion is that the complaint made by the relator is a matter over which the courts have no authority. Inasmuch as the proceedings had in the district court, up to and including the pronouncing

of the sentence of death, were entirely regular, we have no authority to set aside the sentence and release the relator from the sheriff's custody." [1]

This statement assumed that the relief sought in the Supreme Court of Louisiana was only a review of the judicial proceedings in the lower state courts prior to the passing of sentence upon the relator on September 14, 1945. On the contrary, the issue raised there and here primarily concerns the action of state officials on and after May 3, 1946, in connection with their past and proposed attempts to electrocute the relator. This issue properly presents a federal constitutional question based on the impending deprivation of the life of the relator by executive officials of the State of Louisiana in a manner alleged to be a violation of the due process of law guaranteed by the Fourteenth Amendment. The refusal of the writs necessarily denied the constitutional protection prayed for. In ruling against the relator on the pleadings, in the absence of further evidence, the Supreme Court of Louisiana must be taken to have acted upon the allegations of fact most favorable to the relator. The petition contains the unequivocal allegation that the official electrocutioner "turned on the switch and a current of electricity was caused to pass through the body of relator, all in the

[1] That court, in discussing the pleadings, also said:

"In this latter answer or opposition it is admitted that the attempt was made to electrocute Willie Francis on May 3, 1946, in obedience of the death warrant, but it is averred that through some latent electrical defect in the apparatus, no electric current reached the body of Willie Francis and for that reason the sentence of death was not carried out. We have no other evidence, of course, as to whether an electric current did reach the body of Willie Francis. The important fact, however, is that a current of sufficient intensity to cause death, as required by the statute on the subject, and by the death warrant, did not pass through the body of Willie Francis."

This means that, as long as the relator did not die, the court apparently regarded the carrying out of the death sentence as a purely executive function not subject to judicial review.

presence of official witnesses." This allegation must be read in the light of the Louisiana statute which authorized the electrocutioner to apply to the body of the relator only such an electric current as was of "sufficient intensity to cause death." On that record, denial of relief means that the proposed repeated, and at least second, application to the relator of an electric current sufficient to cause death is not, under present circumstances, a cruel and unusual punishment violative of due process of law. It exceeds any punishment prescribed by law. There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful? In spite of the constitutional issue thus raised, the Supreme Court of Louisiana treated it as an executive question not subject to judicial review. We believe that if the facts are as alleged by the relator the proposed action is unconstitutional. We believe also that the Supreme Court of Louisiana should provide for the determination of the facts and then proceed in a manner not inconsistent with this opinion.

That counsel for both sides recognize the materiality of what occurred on May 3, 1946, is demonstrated by the affidavits and the transcript of testimony which they took from available public records and called to the attention of this Court by publication of them in connection with their respective briefs in this Court. Excerpts from those public records, printed in the margin, indicate the conflict of testimony which should be resolved.[2]

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[2] The following excerpts are from copies of affidavits printed as appendices to the brief on behalf of the petitioner. The official witnesses named were persons charged by statute with the duty of making a signed report or "proces verbal" reciting the manner and date of the execution to be filed with the clerk of the court in which the sentence was imposed. La. Code of Criminal Procedure (1928) Act No. 2, Art. 571. The statements refer to what happened after the relator had been strapped into the electric chair and a hood placed before his eyes.

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that

The remand of this cause to the Supreme Court of Louisiana in the manner indicated does not mean that the

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the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.'" Affidavit of official witness Harold Resweber, dated May 23, 1946.

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath.' Then they took the hood from his eyes and unstrapped him.

"This boy really got a shock when they turned that machine on." Affidavit of official witness Ignace Doucet, dated May 30, 1946.

"After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: 'Goodby Willie'. At that very moment, Willie Francis' lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: 'Take it off. Let me breath.' Then the switch was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve." Affidavit of official chaplain Reverend Maurice L. Rousseve, dated May 25, 1946.

Attached to the brief on behalf of the respondents there was submitted a copy of the transcript of testimony taken before the Louisiana Pardon Board on May 31, 1946, in support of the relator's application for executive clemency which was denied June 1, 1946. This transcript includes testimony of those who were in charge of the electrical equipment on May 8, to the effect that no electric current reached the body of the relator and that his flesh did not show electrical burns. It also included a statement by the sheriff of a neighboring parish, who accompanied the relator from the chair, that the relator told him on leaving the chair that the electric current had "tickled him."

These public records were not in existence and therefore not before the Supreme Court of Louisiana when it rendered its decision on May 15, 1946.

relator necessarily is entitled to a complete release. It means merely that the courts of Louisiana must examine the facts, both as to the actual nature of the punishment already inflicted and that proposed to be inflicted and, if the proposed punishment amounts to a violation of due process of law under the Constitution of the United States, then the State must find some means of disposing of this case that will not violate that Constitution.

For the reasons stated, we are unable to concur in the judgment of this Court which affirms the judgment below.